No. ____

In the

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTICRARI

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QUESTION PRESENTED

In the Outer Continental Shelf Lands Act ("OCSLA"), Congress declared federal law to be the exclusive source of law on the Outer Continental Shelf ("OCS"). To fill the gaps in the coverage of federal law, Congress provided that the law of the adjacent state would be borrowed as federal law, to the extent that such state law is "applicable" and "not inconsistent with" existing federal law. Consistent with this Court's decisions, the Fifth Circuit has long held that state law is not borrowed as surrogate federal law under OCSLA unless there is a gap in federal law, as with a garden-variety contract claim. In the decision below, the Ninth Circuit expressly disagreed with the Fifth Circuit and held that state law should be borrowed as federal law governing the OCS whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, regardless of whether there is a gap in federal law. It thus held that California's wage-and-hour laws apply to claims filed by workers on drilling platforms on the OCS, even though the Fair Labor Standards Act already provides a comprehensive set of federal rights and remedies. The result is wholly unanticipated and potentially massive liability for OCS operators that fully complied with the FLSA.

The question presented is:

Whether, under OCSLA, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit has held.

PARTIES TO THE PROCEEDING

Defendant-appellee below, who is the petitioner in this Court, is Parker Drilling Management Services, Ltd.

Plaintiff-appellant below, who is the respondent in this Court, is Brian Newton.

CORPORATE DISCLOSURE STATEMENT

Parker Drilling Management Services, Ltd.'s parent company and sole member is wholly owned by Parker Drilling Company, which is a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

The federal government has exclusive control and sovereignty over the Outer Continental Shelf ("OCS"). Congress, anticipating extensive mineral-resource development on the OCS, enacted the Outer Continental Shelf Lands Act ("OCSLA") to define a body of law applicable to drilling platforms affixed to the OCS, on which thousands of people live and work for extended periods of time. After considering and rejecting the wholesale application of state law or maritime law, Congress made federal law the exclusive source of law on the OCS. 43 U.S.C. §1333(a)(1). Thus, all law on the OCS is federal law, and no state law applies of its own force. Congress recognized, however, that federal law, because of its interstitial nature, would not address every issue that arose on the OCS. Accordingly, to fill gaps in federal law, Congress declared that the laws of the adjacent state would be borrowed as the applicable federal law governing the OCS to the extent those laws are "applicable" and "not inconsistent with" preexisting federal law. 43 U.S.C. §1333(a)(2)(A).

In a trilogy of cases interpreting OCSLA, this Court recognized that state law never applies of its own force on the OCS but can sometimes serve as surrogate federal law to fill gaps in the coverage of federal law. In the first of these cases, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court explained that "state law [is] used only to supplement federal law," *id.* at 358, and held that state law supplied the federal rule of decision for the plaintiffs' wrongful-death actions only because there was a gap in federal law—in other words, because the

"inapplicability of [federal law] removes any obstacle to the application of state law by incorporation as federal law," *id.* at 366. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court again explained that Congress incorporated state law standards "for filling in the gaps in federal law." *Id.* at 104-05. And in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), this Court reiterated that state law's function under OCSLA is "to fill the substantial 'gaps' in the coverage of federal law." *Id.* at 480. State law supplied the content of federal law in all three cases, but only because there was no other federal law to apply.

Consistent with those cases, the Fifth Circuit held early on that state law is "applicable" as federal law under OCSLA only when it is needed "to fill a significant void or gap" in federal law. *Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969). In *Continental Oil*, the Fifth Circuit affirmed dismissal of a lawsuit filed under Louisiana law, explaining that federal law already provided the plaintiffs with a complete set of "substantive rights and remedies" to govern their dispute. *Id.* Because there was "no void" and "no gaps" in the coverage of federal law, the Louisiana statute did not apply as surrogate federal law. *Id.* at 1036, 1040. As a binding decision of the old Fifth Circuit, *Continental Oil* governs the entire Gulf Coast.

In light of *Continental Oil* and this Court's cases, employers and employees have long structured their relationships on the understanding that state wage-and-hour laws do not apply on the OCS because the Fair Labor Standards Act ("FLSA") is a comprehensive federal scheme that leaves no gap for

state law to fill. But after the California Supreme Court issued a worker-friendly decision in *Mendiola v. CPS Security Solutions, Inc.*, 340 P.3d 355 (Cal. 2015), employees on the OCS filed a spate of class-action lawsuits, arguing that California's wage-and-hour laws have applied all along and under California law OCS operators owe compensation not just for hours spent working, but for all time spent on the platform, including time spent sleeping and otherwise not working. District courts uniformly rejected that argument, relying on *Continental Oil*.

In the decision below, the Ninth Circuit disagreed with the Fifth Circuit and every other court to consider the issue, holding that state law extends to the OCS regardless of whether there is a gap in federal law. The Ninth Circuit expressly "reject[ed]" the Fifth Circuit's rule that state law is "applicable" under OCSLA only if needed "to fill a significant void or gap" in federal law. App.2. It instead concluded that state law is "applicable" on the OCS whenever it "pertain[s] to the subject matter at hand." App.21. Applying that expansive standard, the Ninth Circuit held that California's wage-and-hour laws are "applicable" on the OCS because they pertain to respondent's wage-and-hour claims, and are "not inconsistent" with federal law because the FLSA contains a savings clause that would preserve state wage-and-hour laws under preemption principles. App.35-39. In recognition of the circuit split and far-reaching consequences of its decision, the Ninth Circuit stayed the mandate pending a petition for certiorari.

Certiorari is plainly warranted to resolve this acknowledged split of authority. Indeed, the Ninth

Circuit's decision not only opens a split among the circuits with jurisdiction over almost all drilling operations on the OCS, but its interpretation badly misconstrues the text, history, and purpose of OCSLA. As every court to consider the issue has recognized until now, Congress intended for state law to supply the applicable federal rule on the OCS only to fill gaps in federal law. Where, as here, a comprehensive set of federal rights and remedies already governs a dispute, importing different state-law standards turns OCSLA on its head by giving primacy to state law instead of the federal law that Congress deemed exclusive.

The Ninth Circuit's decision injects uncertainty into what had been a settled area of the law, and it will have serious consequences for companies on the OCS. Those companies and their employees have negotiated mutually beneficial compensation plans that account for the distinct circumstances of offshore work, in good-faith reliance on decades of precedent making clear that the FLSA is the exclusive source of wage-and-hour law on the OCS. If allowed to stand, the Ninth Circuit's decision would require a wholesale restructuring of the way those employees are compensated, would threaten massive retroactive liability, and would allow states seeking to discourage offshore energy development to enact divisive laws that would frustrate Congress' plain intent.

This Court has repeatedly reversed Ninth Circuit decisions imposing FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018); *Integrity Staffing Sols. v. Busk*, 135 S. Ct.

513 (2014); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). The decision below does those earlier Ninth Circuit decisions one better by unsettling expectations and threatening massive liability on employers who have indisputably complied with the FLSA. This Court should grant certiorari to restore uniformity to this important area of the law and correct the Ninth Circuit's deeply flawed interpretation of OCSLA.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 881 F.3d 1078 and reproduced at App.1-41. The district court's order granting judgment on the pleadings is available at 2015 WL 12645746 and reproduced at App.46-60.

JURISDICTION

The Ninth Circuit issued its opinion on February 5, 2018. On April 27, 2018, the Ninth Circuit denied a petition for rehearing en banc, but the panel issued an amended opinion and, on May 16, 2018, stayed its mandate pending certiorari. On July 5, 2018, Justice Kennedy extended the time for filing this petition to August 27, 2018. On August 8, 2018, Chief Justice Roberts extended the time for filing this petition to September 24, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of OCSLA are set forth in the appendix.

STATEMENT OF THE CASE

A. The Outer Continental Shelf Lands Act

The OCS consists of all submerged coastal lands that are within the United States' jurisdiction but outside the territorial jurisdiction of the individual states. *See* App.5; 43 U.S.C. §1331(a). Along the coast, state control over offshore lands extends three nautical miles outward. All submerged lands seaward from there and within the United States' jurisdiction under international law (ordinarily, submerged lands within 200 nautical miles of the shore) constitute the OCS and fall under exclusive federal jurisdiction. *See Amber Res. Co. v. United States*, 538 F.3d 1358, 1362 (Fed. Cir. 2008).

OCSLA grew out of a dispute "between the adjacent States and the Federal Government over territorial jurisdiction and ownership of the OCS and, particularly, the right to lease the submerged lands for oil and gas exploration." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). After this Court ruled that the federal government had exclusive jurisdiction over the OCS, *see United States v. California*, 332 U.S. 19, 38-39 (1947), Congress enacted OCSLA and "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit," *Shell Oil*, 488 U.S. at 27.

OCSLA's primary purpose was to "define a body of law applicable to the seabed, the subsoil, and the fixed structures such as [drilling platforms] on the [OCS]." *Rodrigue*, 395 U.S. at 355. Congress initially considered treating drilling platforms like vessels and applying maritime law, but ultimately concluded "that maritime law was inapposite to these fixed

structures." *Id.* at 363. Congress also rejected the direct application of the law of the adjacent state, deciding against "the notion of supremacy of state law administered by state agencies." *Cont'l Oil*, 417 F.2d at 1036. Congress instead declared the OCS a federal enclave governed exclusively by federal law: "The Constitution and laws ... of the United States are extended to the [OCS] ... to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1); *see Rodrigue*, 395 U.S. at 357 ("[F]ederal law is 'exclusive' in its regulation of this area."). Put succinctly, all law on the OCS is federal law.

At the same time, Congress recognized that "federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems" that could arise on drilling platforms. *Rodrigue*, 395 U.S. at 357. Accordingly, to fill "gaps in the federal law," *id.*, Congress borrowed the laws of the adjacent state as surrogate federal law on the OCS, but only to the extent those laws "are applicable and not inconsistent with this subchapter or with other Federal laws and regulations." 43 U.S.C. §1333(a)(2)(A). To ensure that this limited incorporation of state-law standards as federal law would not erode federal control over the OCS, Congress clarified that OCSLA's choice-of-law provisions "shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the [OCS]." 43 U.S.C. §1333(a)(3). In short, no state law operates of its own force on the OCS, and states have no direct sovereignty over the OCS.

This Court has described the resulting choice-of-law scheme as follows: "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore*, 453 U.S. at 480.

B. The Fair Labor Standards Act

The FLSA is a "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941), that protects "all covered workers from substandard wages and oppressive working hours," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Among the topics the FLSA and its implementing regulations address is whether employees must be compensated for time spent on the employer's premises but off-duty, including time spent sleeping. For example, federal regulations provide that "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." 29 C.F.R. §785.23; *see id.* §§785.14-785.22. While there is no "legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time," *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944), courts have developed a substantial body of case law to determine whether such hours are compensable. *See, e.g.*, *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 940-41 (9th Cir. 2004) (holding sleep time non-compensable for employees residing on their employer's premises); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1247 (5th Cir.

1986) (holding off-duty hours non-compensable for employees residing on employer's barges).

C. Factual & Procedural Background

Respondent Brian Newton worked from January 2013 to January 2015 on Parker's drilling platforms, which are attached to the OCS off the California coast. App.2. As is standard for employees on drilling platforms, Newton worked fourteen-day shifts on the platform. App.3. During each shift, he remained on the platform at all times, spending 12 hours on duty and 12 hours off duty; other crew members maintained the opposite schedule, allowing the rig to operate 24 hours a day. App.3. For working that atypical schedule, Newton, like most employees on drilling rigs, earned "well above the state and federal minimum wage," including "premium rates for overtime hours." App.20.

In January 2015, the California Supreme Court held in *Mendiola* that, unlike the FLSA, California's wage-and-hour laws entitled workers to "compensation for all on-call hours spent at their assigned worksites." 340 P.3d at 357. Barely one month later, Newton filed a putative class action in California state court, alleging that California's wage-and-hour laws required Parker to pay him not only for the 12 hours he actually worked each day on the platform, but also for the 12 hours he spent off-duty, including time spent sleeping. App.3. Parker removed the action to federal court and moved for judgment on the pleadings, arguing that OCSLA does not adopt California's wage-and-hour laws as surrogate federal law because there is no gap in federal law for state law to fill. App.4.

The district court granted Parker's motion. Relying on the Fifth Circuit's *Continental Oil* line of cases, the district court explained that "under OCSLA, federal law governs and state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." App.51 (quoting *Cont'l Oil*, 417 F.2d at 1036). Because the FLSA is a comprehensive federal wage-and-hour scheme, the court observed, "there are no significant voids or gaps" in federal law, and therefore "it is not necessary to apply the law of the adjacent state." App.52.

The Ninth Circuit, in a decision by Judge Christen and joined by Judges Paez and Berzon, reversed. Expressly rejecting *Continental Oil*, the court held that "the absence of federal law is not ... a prerequisite to adopting state law as surrogate federal law under [OCSLA]." App.2. The court acknowledged that the Fifth Circuit interpreted OCSLA and this Court's cases as "requir[ing] that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Cont'l Oil*, 417 F.2d at 1036. The court likewise acknowledged that every district court in the Ninth Circuit to consider the issue had followed the Fifth Circuit's lead and "concluded that California's wage and hour laws do not extend to OCS platform workers because the FLSA leaves no gap for state law to fill." App.20 n.13. The court nonetheless disagreed with that previously unanimous interpretation: "We ... reject the proposition that 'necessity to fill a significant void or gap' is required in order to assimilate 'applicable and not inconsistent' state law into federal law." App.2 (citations omitted). Instead, the court held, state laws are "applicable" under

OCSLA whenever they "pertain[] to the subject matter at hand." App.21.

The court next addressed the meaning of "not inconsistent with." 43 U.S.C. §1333(a)(2)(A). The court held that California's wage-and-hour laws are "not inconsistent with" the FLSA because the FLSA's savings clause "explicitly permits more protective state wage and hour laws." App.36; *see* 29 U.S.C. §218(a). Having concluded that "California's minimum wage and maximum hours worked provisions are applicable and not inconsistent with the FLSA," the court vacated the district court's judgment and remanded for further proceedings. App.39 (citation omitted).

The court denied a petition for *en banc* review, but the panel amended its opinion to direct the district court to consider whether its holding "should be applied retrospectively." App.43. The court granted petitioner's motion to stay the mandate pending the filing of a petition for certiorari. App.44-45.

REASONS FOR GRANTING THE PETITION

This case presents an acknowledged split of authority among the circuits with jurisdiction over almost all OCSLA cases. In a clear departure from Fifth Circuit precedent that is sufficiently longstanding that it also binds the Eleventh Circuit, the Ninth Circuit held that OCSLA adopts state law as surrogate federal law on the OCS even when federal law already provides a comprehensive set of rights and remedies to govern the dispute such that there is no gap in federal law to fill. The court readily acknowledged that its decision conflicts with the Fifth Circuit's *Continental Oil* decision, but it expressly

"reject[ed]" that approach and instead adopted a standard that the Fifth Circuit had expressly rejected fifty years earlier. The Ninth Circuit's suggestion that the Fifth Circuit might no longer adhere to *Continental Oil* is readily disproved, as even the Ninth Circuit itself ultimately seemed to recognize. And *Continental Oil* continues to bind the Eleventh Circuit in all events. Certiorari is thus warranted because the decision below conflicts with "the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a).

A circuit split over the meaning of a federal statute would be undesirable in any circumstance, but the practical realities of the OCS magnify the consequences here. Almost all litigation concerning OCSLA occurs within the confines of the old Fifth and current Ninth Circuits, and companies with operations offshore in both regions may be subject to Ninth and Fifth Circuit precedents simultaneously, making uniformity particularly critical. The decision below also disrupts longstanding relationships among employers and employees on the OCS, who have negotiated mutually beneficial compensation plans in good-faith reliance on the shared understanding that the FLSA was the exclusive source of wage-and-hour law on the OCS. The decision below would require a wholesale reworking of those relationships, and in the meantime threatens massive retroactive liability on companies who fully complied with the FLSA. This Court has not hesitated to intervene in previous cases where the Ninth Circuit exposed employers to massive, unexpected liability for merely following seemingly settled law, and it should do so again here.

Certiorari is all the more critical because the decision below is wrong. The text, history, and purpose of OCSLA's choice-of-law provisions—along with this Court's cases applying them—make clear that state law's only role under OCSLA is to provide a federal rule of decision "to fill federal voids." *Rodrigue*, 395 U.S. at 358. The Ninth Circuit reached a contrary conclusion only by ignoring this Court's cases, employing deeply flawed statutory interpretation, and refusing to engage with the historical evidence, all of which demonstrates that state law becomes "applicable" as federal law only when there is no other federal law to apply. Here, because the FLSA is a comprehensive federal scheme that provides rights and remedies with respect to each of Newton's allegations, there is no gap in the coverage of federal law, and thus no need to adopt state law as surrogate federal law.

Even if state law could be deemed "applicable" under OCSLA without a gap in federal law, the decision below would still be wrong because the state wage-and-hour laws Newton invokes are "inconsistent with" the FLSA for OCSLA purposes. The Ninth Circuit proceeded as if the "inconsistency" inquiry under OCSLA is little different from conflict preemption. But that ignores the most basic aspect of OCSLA—namely, that Congress reaffirmed exclusive federal sovereignty over the OCS and decided to make *all* law applicable on the OCS *federal* law. Thus, no state law applies on the OCS as a result of the state's residual sovereignty. While it makes perfect sense to respect state sovereignty and demand an affirmative conflict between state and federal law before finding conflict preemption, that demanding standard is

wholly misplaced on the OCS, where all law is federal and the only question is whether Congress wanted overlapping and inconsistent federal standards.

The Ninth Circuit's error is evident in its reliance on the FLSA's savings clause, which saves state and local wage laws. Congress' federalism-friendly decision not to displace state and local laws in Fresno says nothing about whether Congress would want to have two federal laws, each prescribing a different minimum wage, governing the exclusive federal enclave that is the OCS. Yet that is the counterintuitive result ushered in by the decision below. Once inconsistency is judged without reference to inapposite preemption-like principles, the inconsistency between the FLSA and a federal wage-and-hour regime borrowed from California is obvious. One federal law tells employers to pay $7.25 per hour; the other federal law tells them to pay $11.00 per hour. One federal law allows them to pay for hours actually worked; the other federal law demands payment for time spent sleeping on the premises. While compliance with both federal laws is possible (by always complying with the more burdensome requirement), no rational Congress—and certainly not the Congress that passed OCSLA with a modest gap-filling mission in mind—would impose such inconsistency.

I. The Ninth Circuit's Decision Openly Conflicts With Fifth Circuit Precedent That Is Also Binding In The Eleventh Circuit.

In a departure from almost fifty years of Fifth Circuit precedent and industry reliance, the Ninth Circuit held that state law can apply on the OCS even

when there are no gaps in the coverage of federal law. The court readily acknowledged that its interpretation of OCSLA conflicted with the Fifth Circuit's, stating that it "reject[ed]" *Continental Oil*'s holding that "'necessity to fill a significant void or gap' is required in order to assimilate 'applicable and not inconsistent' state law into federal law." App.2 (quoting *Cont'l Oil*, 417 F.2d at 1036, and 43 U.S.C. §1333(a)(2)(A)). And because *Continental Oil* predated the division of the Fifth Circuit, *Continental Oil* is binding precedent in the Eleventh Circuit and governs the entire Gulf Coast. This Court's review is needed to resolve this circuit split among the circuits with jurisdiction over virtually all drilling operations on the OCS.

A. In *Continental Oil*, the Fifth Circuit held that state law is not "applicable" as surrogate federal law unless it is needed to fill a gap in the coverage of federal law. The dispute in *Continental Oil* arose from a collision between a ship and a drilling platform affixed to the OCS. 417 F.2d at 1031. The owner of the drilling platform sued the shipowner's insurer, attempting to invoke a Louisiana statute that allowed direct actions against an insurer without first obtaining a judgment against the insured. *Id.* at 1031-32. The district court dismissed the lawsuit and the Fifth Circuit affirmed, holding that state law is "applicable" under OCSLA only when it is needed "to fill a significant void or gap" in federal law. *Id.* at 1036. Because federal law already provided "substantive rights and remedies" for injuries arising from the collision, "[t]here is no void, there are no gaps." *Id.* Accordingly, the Louisiana statute did not apply. *Id.* at 1040.

In reaching that conclusion, the Fifth Circuit relied extensively on *Rodrigue*, 395 U.S. 352; *see infra*. The "recurring theme" of *Rodrigue*, according to the Fifth Circuit, was that Congress' "deliberate choice of federal law ... requires that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Cont'l Oil*, 417 F.2d at 1036. The Fifth Circuit highlighted *Rodrigue*'s repeated references to OCSLA's use of state law to "supplement[] gaps" or to "fill federal voids." *Id.* at 1036; *see, e.g.*, *Rodrigue*, 395 U.S. at 358 ("This language makes it clear that state law could be used to fill federal voids.").

The *Continental Oil* court expressly rejected the plaintiff's argument that "the term 'applicable'" means only that the relevant state law is "applicable to the subject matter in question." 417 F.2d at 1035. That overly broad interpretation, the court explained, "imputes to Congress the purpose generally to export the whole body of adjacent [state] law onto the" OCS. *Id.* at 1035. Such a result "is hardly in keeping with" Congress' "reject[ion]" in OCSLA of "the notion of supremacy of state law administered by state agencies." *Id.* at 1036.

The Fifth Circuit has continued to apply the *Continental Oil* test in cases presenting choice-of-law questions on the OCS. In *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), for example, it held that a Louisiana statute did not apply to a lawsuit between two employees on an offshore drilling rig. The court reaffirmed that state law was not "applicable" under OCSLA unless it was "necessary to fill some gap in federal law," which was not the case because the Longshore and Harbor Workers' Compensation Act

provided a federal remedy and thus left "no gap—not even a tiny one." *Id.* at 589. Likewise, in *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), a Louisiana retaliatory discharge statute did not apply on the OCS because "Congress provided a specific statutory provision (33 U.S.C. §948a) to address retaliatory discharges." *Id.* at 509; *see also Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 557 (5th Cir. 1989) (holding that state law does not apply to apportionment of attorney's fees because "there is applicable federal law").

Before the Ninth Circuit's decision in this case, several district courts within the Ninth Circuit had followed *Continental Oil* in holding that state law is applicable as surrogate federal law on the OCS only when it is needed "to fill gaps in federal law." *Williams v. Brinderson Constructors Inc.*, 2015 WL 4747892, at *4 (C.D. Cal. Aug. 11, 2015); *see* App.20 n.13 (collecting cases). Not one district court held otherwise.

B. In this case, the Ninth Circuit expressly disagreed with the Fifth Circuit's *Continental Oil* line of cases, stating: "[W]e are not convinced that state law applies as surrogate federal law on the OCS only if 'necess[ary],' *Cont'l Oil*, 417 F.2d at 1036, in the sense that there is no existing federal law on the subject." App.26. The court explicitly "reject[ed]" the Fifth Circuit's rule that state law is "applicable" under OCSLA only if it is necessary "to fill a significant void or gap." App.2. Then, exacerbating the conflict, it adopted a standard that the Fifth Circuit had specifically rejected in *Continental Oil*. Whereas the Fifth Circuit declined to read the term "applicable" as

meaning "applicable to the subject matter in question," *Cont'l Oil*, 417 F.2d at 1035, the Ninth Circuit embraced exactly that standard, holding that state laws are "applicable" whenever they "pertain[] to the subject matter at hand." App.21. Applying that expansive standard, the panel held that California's wage-and-hour laws are "applicable" on the OCS because they pertain to the subject matter of Newton's claim. App.35-39.

While it openly acknowledged its disagreement with *Continental Oil*, the Ninth Circuit tried to soften that blow by suggesting that the Fifth Circuit might have moved away from *Continental Oil*. In particular, the Ninth Circuit stated that it was "unclear" whether a test set forth in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990) ("*PLT*"), "has superseded the *Continental Oil* test in the Fifth Circuit." App.19. That suggestion is simply wrong. The Fifth Circuit's *PLT* decision was written by the same judge as *Continental Oil* and contains not a whiff of disapproval of that jurist's earlier decision—and under the Fifth Circuit's rule of orderliness, *see Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008), even a panel less sensitive to consistency with its earlier work product could not have "superseded" *Continental Oil*. Moreover, nothing in *PLT* could affect *Continental Oil*'s status as binding law in the Eleventh Circuit.

In reality, and as the Ninth Circuit ultimately recognized, "the *Continental Oil* test" is "a precursor to the *PLT* test"; the latter test addresses the subsequent determination of what type of law fills the gap once the logically anterior determination that

"there is a significant gap or void in federal law" has already been made. App.19. The dispute in *PLT* was a standard contract dispute; the absence of an on-point federal statute went without saying. *See* 895 F.2d at 1046. The only question was whether the gap in federal law should be filled by state law or, instead, by general maritime law. The Fifth Circuit created the so-called "*PLT* test" to answer that question, holding that maritime law would fill the gap if it would "apply of its own force" in the absence of OCSLA; otherwise, state law would supply the federal rule of decision if it was "not inconsistent with" federal law. *Id.* at 1047. Thus, *PLT* only confirms the Fifth Circuit's view that Congress intended for state law to apply only "to fill in the gaps in the federal law." *Id.* at 1052; *see also In re Deepwater Horizon*, 745 F.3d 157, 166 & n.10 (5th Cir. 2014) (calling the *PLT* test a "misfit" in light of federal statutes already "regulating water pollution and oil pollution").[1]

In sum, the decision below expressly rejects longstanding Fifth Circuit precedent, which also governs the Eleventh Circuit, holding that state law is "applicable" as surrogate federal law under OCSLA only if state law is "necess[ary] to fill a significant void or gap" in the coverage of federal law. *Cont'l Oil*, 417 F.2d at 1036. Instead, in the Ninth Circuit, state law is "applicable" under OCSLA whenever it "pertain[s] to the subject matter at hand," App.21, even when it

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[1] In every case in which the Fifth Circuit has applied the *PLT* test, the only potentially applicable sources of law were general maritime law and state law—*i.e.*, there was an unquestioned gap in federal law. *See, e.g.*, *ACE Am. Ins. Co. v. M-I, L.L.C.*, 699 F.3d 826, 832 (5th Cir. 2012) (contract dispute).

is not needed to fill a gap in federal law. The Ninth Circuit's explicit departure from the Fifth Circuit's longstanding view—and its adoption of the very standard that the Fifth Circuit has rejected—creates a circuit split that clearly warrants this Court's review.

II. The Ninth Circuit's Decision Creates An Intolerable Split, Undermines Reliance Interests, And Invites Strategic Behavior By States.

A circuit split over the meaning of a federal statute would be undesirable in any circumstance, but the practical realities of the OCS and oil and gas operations there exacerbate the consequences and underscore the need for certiorari here. The Fifth, Eleventh, and Ninth Circuits have jurisdiction over virtually all existing operations on the OCS in the United States—*i.e.*, off the Gulf Coast and the Pacific Coast (including Alaska). As a result, almost all litigation concerning OCSLA occurs in these circuits, rendering the split here both unlikely to benefit from further percolation and particularly intolerable. Making matters worse, for companies with operations offshore in both regions, enterprise-wide policies and employer-employee relationships may be subject to Ninth and Fifth Circuit precedent simultaneously, making uniformity regarding OCSLA's choice-of-law rules particularly important.

Certiorari is also critical because the Ninth Circuit's decision disrupts longstanding employer-employee relationships. Employers and employees on the OCS, often through collective bargaining, have implemented mutually beneficial compensation and

benefit systems based around the shared understanding that the FLSA is the exclusive source of wage-and-hour law on the OCS. For example, many employers and employees have agreed to exclude sleep time from hours worked, as expressly permitted by federal law. *See* 29 C.F.R. §785.22. Under California law, however, such agreements are ineffective in all but a few select industries. *See Mendiola*, 340 P.3d at 365-66. The Ninth Circuit's holding would thus force employers and employees into compensation plans that differ from agreements they voluntarily negotiated, which—unlike California's wage-and-hour laws—were specifically tailored to the distinctive circumstances of work on offshore drilling platforms.

This Court has not looked favorably on analogous attempts by plaintiffs to use novel theories of wage-and-hour liability to upset long-settled industry practices. In the FLSA context, for example, the Court has explained that it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158. Newton and the class he represents do not seek to impose liability under the FLSA, but the effect on settled expectations and industries practices is the same. In fact, this lawsuit is even more problematic, as it threatens massive liability against employers who undisputedly *complied with* the FLSA on platforms governed exclusively by federal law. Those employers, who relied for fifty years on the unquestioned proposition that the FLSA is the exclusive source of wage-and-hour law on the OCS, have now been blindsided by the Ninth Circuit's

holding that state wage-and-hour standards also apply as overlapping federal law and have done so all along. This Court has repeatedly intervened to address (and ultimately reject) similar efforts by the Ninth Circuit to expose settled industry practices to massive, unexpected liability, *see Encino Motorcars*, 138 S. Ct. 1134; *Integrity Staffing*, 135 S. Ct. 513; *Christopher*, 567 U.S. at 142, and should do so again here.

Finally, the Ninth Circuit's decision invites strategic behavior by States that are hostile to offshore drilling. Because state laws presumptively apply on the OCS under the decision below, States may attempt to enact targeted laws that increase the difficulty and cost of OCS operations, deterring activity the federal government seeks to encourage. That is plainly inconsistent with Congress' basic judgment in OCSLA to make the OCS an enclave of exclusive federal jurisdiction where only federal law governs. Along the same lines, the decision below encourages opportunistic plaintiffs to file copycat suits addressed to the OCS every time California broadens its wage-and-hour protections. This Court should grant certiorari to restore uniformity to this important area of the law and arrest the far-reaching consequences of the decision below.

III. The Ninth Circuit's Decision Is Incorrect.

Certiorari is all the more critical because the Ninth Circuit's decision is wrong. By holding that state law can apply on the OCS even absent a gap in federal law, the Ninth Circuit misinterpreted OCSLA and this Court's precedent, both of which make clear that state law's only role is "to fill federal voids."

Rodrigue, 395 U.S. at 358. Moreover, by holding that California's wage-and-hour laws are "not inconsistent" with the FLSA because of the FLSA's savings clause, the Ninth Circuit failed to recognize that OCSLA incorporates state law *as federal law*, making preemption principles and the FLSA's savings clause's carve-out for state law entirely inapt.

A. State Law Is Applicable Under OCSLA Only When There Are Gaps in the Coverage of Federal Law Necessary For State Law to Fill.

1. Congress enacted OCSLA in the wake of a protracted dispute between the federal government and the States over sovereignty and ownership of coastal submerged lands. After this Court held that all submerged lands belong exclusively to the federal government, *United States v. California*, 332 U.S. at 38-39, Congress crafted a compromise to quell the "deep political and emotional currents centered around the clash between national sovereignty and states' rights," *Cont'l Oil*, 417 F.2d at 1036: It ceded all federal interest in submerged lands within three miles of the coast, 43 U.S.C. §§1301-1315, but affirmed its absolute sovereignty and control over the OCS. *Gulf Offshore*, 453 U.S. at 479 n.7.

Having ceded control over submerged lands within the three-mile belt, Congress had no interest in allowing States to assert any sovereignty or direct legislative control over the OCS. Accordingly, it made federal law the exclusive source of law: "The Constitution and laws ... of the United States are extended to the subsoil and seabed of the [OCS] ... to the same extent as if the [OCS] were an area of

exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1); *see Rodrigue*, 395 U.S. at 357 ("[F]ederal law is 'exclusive' in its regulation of this area.").

Congress recognized, of course, that "because of its interstitial nature, federal law would not provide a sufficiently detailed legal framework to govern life on the miraculous structures which will rise from the sea bed of the [OCS]." *Shell Oil*, 488 U.S. at 27. But the substantial gaps in the coverage of federal law neither deterred Congress from making federal law exclusive nor led Congress to adopt proposals that would have treated the OCS as if it were part of the adjacent state. *See Rodrigue*, 395 U.S. at 358-59. And, critically, under OCSLA, state law *never* applies on the OCS of its own force—*i.e.*, there is no state law applicable *qua* state law on the OCS. Instead, Congress borrowed state standards as federal law only to "fill federal voids," adopting state law as surrogate federal law to "supplement[] gaps in the federal law." *Id.* at 357-58; *see* 43 U.S.C. §1333(a)(2)(A) ("To the extent that they are applicable and not inconsistent with [federal law], the civil and criminal laws of each adjacent State ... are declared to be the law of the United States.").

This Court has repeatedly recognized the limited, gap-filling role of state law under OCSLA. This Court first addressed OCSLA's choice-of-law provisions in *Rodrigue*. The question there was whether Louisiana state law or the federal Death On The High Seas Act ("DOHSA") applied to wrongful-death actions filed by survivors of workers who died on drilling rigs. 395 U.S. at 352-53. This Court traced OCSLA's history, recounting that Congress rejected both the wholesale

application of maritime law and the wholesale application of state law and instead made federal law exclusive. *Id.* at 355-58. In describing state law's limited role, this Court repeatedly emphasized that state law applied only "to fill federal voids." *Id.* at 358; *see id.* at 357 ("[T]he Act supplemented gaps in the federal law with state law."); *id.* at 362 ("[T]he whole body of Federal law was made applicable to the area as well as state law where necessary." (alterations omitted)).

In light of state law's limited, gap-filling role, the *Rodrigue* Court reasoned that if the incidents at issue were within DOHSA's scope, then DOHSA would apply and provide "the exclusive remedy for these deaths." *Id.* at 353, 359. The Court determined, however, that the incidents did not occur on the "high seas" and therefore were outside DOHSA's scope. *Id.* at 359-60, 366. Because of the absence of applicable federal law, this Court held that OCSLA permitted the adoption of state law as surrogate federal law. *Id.* at 366. The "recurring theme" of *Rodrigue*, as the Fifth Circuit noted, is that state law does not apply on the OCS unless it is "necess[ary] to fill a significant void or gap" in federal law. *Cont'l Oil*, 417 F.2d at 1036.

This Court's subsequent OCSLA cases are much the same. In *Huson*, 404 U.S. 97, this Court held that courts cannot fill the gaps in federal law by creating federal common law: "Congress made clear provision for filling in the gaps in federal law; it did not intend that federal courts fill in those gaps themselves by creating new federal common law." *Id.* at 104-05. That holding is necessarily premised on the idea that state law (and not federal common law) serves a

purely gap-filling role. Likewise, in *Gulf Offshore*, this Court reiterated that state law's role under OCSLA is "to fill the substantial 'gaps' in the coverage of federal law." 453 U.S. at 480; *see Maryland v. Louisiana*, 451 U.S. 725, 752 n.26 (1981) ("[OCSLA] borrows 'applicable and not inconsistent' state laws for certain purposes, such as were necessary to fill gaps in federal laws.").

This Court's cases thus all reflect that Congress borrowed state law standards as surrogate federal law not out of any respect for state sovereignty. To the contrary, Congress expressly rejected claims of state sovereignty over the OCS and reaffirmed its status as an exclusive federal enclave where all law is federal law. It follows ineluctably from that most basic congressional decision that state standards of conduct are borrowed out of necessity, not out of respect for state sovereignty and not where other federal law already applies and governs the conduct at issue. In short, this Court's repeated recognition that state law on the OCS is limited to a gap-filling role reflects not just the text of OCSLA but Congress' most fundamental judgment in enacting that statute.

2. The Ninth Circuit overlooked all of this in declaring that state law can apply on the OCS even without a gap in federal law. Its analysis was wrong at every turn.

Beginning with the text, the Ninth Circuit settled on its definition of "applicable" only by employing a flawed brand of textualism that defies this Court's precedents. "Statutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Rather, "the words of a statute must be read

in their context and with a view to their place in the overall statutory scheme." *Id.* This Court's decision in *Ransom v. FIA Card Services*, 562 U.S. 61 (2011), which interpreted the word "applicable" in the phrase "applicable monthly expense amount," demonstrates how the analysis should proceed. The Court began by citing dictionaries that defined "applicable" as "appropriate, relevant, suitable, or fit." *Id.* at 69-70. But instead of stopping there and adopting a broad definition of "applicable," the Court considered how those definitions made the most sense in light of the statute's "text, context, and purpose." *Id.* at 80; *see id.* at 69-74. The Court concluded from its extensive contextual analysis that Congress must have used the word "applicable" as a limiting term—*i.e.*, to "filter[] out debtors for whom a deduction is not at all suitable." *Id.* at 74.

Here, in contrast, the Ninth Circuit simply went with the first dictionary definition it found. *See* App.21. Instead of assessing which dictionary definitions made the most sense in light of OCSLA's broader context, the Ninth Circuit merely declared that "applicable" must mean "pertain[ing] to the subject matter at hand." *Id.* That short-circuited analysis failed to read the words of the statute "in their context and with a view to their place in the overall statutory scheme." *Sturgeon*, 136 S. Ct. at 1070. Had the Ninth Circuit conducted the proper analysis, it would have concluded, like *Ransom*, that the word "applicable" serves a limiting function, narrowing the universe of state laws that may be considered for adoption as surrogate federal law—*i.e.*, that state law becomes "applicable" only when the

absence of federal law makes resort to state law "suitable" or "appropriate."

No other interpretation of "applicable" makes sense of Congress' deliberate judgment to reject state law as the default body of law governing the OCS. If "applicable" means that state law applies whenever it pertains to activities on the OCS without regard to the existence of any gap in federal law, then Congress achieved indirectly through a subsidiary provision the precise result it directly rejected in OCSLA's principal provisions. That simultaneously violates the elephants-in-mouseholes canon, *see Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001), and the direction that courts are to make "sense, not nonsense" out of federal statutes, *W.V. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991). The far better interpretation is that state law is "applicable" only when there is no applicable federal law governing the subject, leaving a gap to be filled.

The Ninth Circuit's definition renders the word "applicable" superfluous. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible"). If all Congress meant was that state law must "pertain to the subject matter at hand," it could have omitted the word "applicable" altogether and achieved the same result; the only laws that *ever* apply to a lawsuit are ones that pertain to the subject matter at hand.[2] Thus, as the Fifth Circuit

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[2] Tellingly, after embracing its definition of "applicable," the Ninth Circuit never analyzed whether California's wage-and-hour laws were "applicable" under that definition—presumably because the laws a plaintiff invokes are invariably "pertinent to the subject matter" of his lawsuit.

put it in *Continental Oil*, the Ninth Circuit's approach places "100% Emphasis" on the phrase "not inconsistent with" and leaves no role for "applicable." 417 F.2d at 1035. In contrast, interpreting the statute to adopt state law only when needed to fill a gap in federal law "ensures that the term 'applicable' carries meaning, as each word in a statute should." *Ransom*, 562 U.S. at 70.

The decision below also fails to account for OCSLA's historical context, which (as outlined above) makes crystal clear that state law standards play only a limited, gap-filling role as borrowed federal standards. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed."). Except for a passing acknowledgement that "Congress was solicitous to retain and ... assert[] the federal government's civil and political jurisdiction over the OCS," App.22-23, the Ninth Circuit breezed right past the historical circumstances surrounding OCSLA's passage, including the very ones on which this Court relied in *Rodrigue*, 395 U.S. at 355-59, and *Gulf Offshore*, 453 U.S. at 478-83.

The Ninth Circuit largely ignored the historical materials this Court invoked in *Rodrigue*. The Senate Report explains that under OCSLA, the body of law applicable on the OCS consists of: (a) federal constitutional and statutory law; (b) federal regulations; and "(c) *in the absence of such applicable Federal law or adequate Secretarial regulation*, the civil and criminal laws of the State adjacent to the [OCS]." S. Rep. No. 83-411, at 2 (1953) (emphasis

added). And on the Senate floor, advocates and opponents of the bill both recognized that state law's only role was to fill gaps. *See* 99 Cong. Rec. 7164 (1953) (Sen. Anderson: "[W]here there is a void, the State law may be applicable."); 99 Cong. Rec. 7257 (1953) (Sen. Long: "[W]hen the Federal law is silent, the State law will apply.").

The Ninth Circuit studiously avoided all of this, instead marshaling irrelevant snippets of legislative history—and even those cherry-picked statements provide little support. The Ninth Circuit quoted a statement by Senator Cordon that, according to the court, "emphasized the importance of ... state law." App.24. In reality, the quoted passage does not extol the importance of state law vis-à-vis federal law, but rather explains why the committee chose state law instead of maritime law to serve as "housekeeping law for the [OCS]" when there is a gap in federal law. 99 Cong. Rec. 6963 (1953).

3. Because state law does not apply on the OCS absent a gap in federal law, California's wage-and-hour law does not apply in this case. The FLSA is "a comprehensive legislative scheme." *Darby*, 312 U.S. at 109. The FLSA indisputably applies on the OCS and its protections are broad, shielding "all covered workers from substandard wages and oppressive working hours, labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine*, 450 U.S. at 739. Because the FLSA applies to the OCS and comprehensively addresses wage-and-hour issues, there is "no gap" in the coverage of federal law—"not even a tiny one."

Nations, 483 F.2d at 589. The application and comprehensiveness of the FLSA is sufficient to make state labor law inapplicable under OCSLA as a general matter.

Examining Newton's specific claims reinforces that there is no gap for California's wage-and-hour law to fill vis-à-vis the FLSA. Newton's first and sixth claims allege minimum-wage and overtime violations. App.3. The FLSA addresses those issues by "establish[ing] federal minimum-wage, maximum-hour, and overtime guarantees." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). Newton's second claim alleges pay stub violations, App.3, which the FLSA addresses by, *inter alia*, requiring employers to keep records of hours worked and wages paid, 29 U.S.C. §211(c). Newton's fifth claim complains of the failure to provide valid meal periods, App.3, which the FLSA addresses by requiring employers to compensate employees for any meal period that is not "bona fide," 29 C.F.R. §785.19. Newton's third claim, for unfair competition, App.3, is based on the same predicate acts as his wage and meal-period claims. Newton's fourth claim alleges failure to timely pay final wages, App.3, which the FLSA addresses by imposing penalties on employers who fail to pay terminated employees on the next regularly scheduled payday, 29 U.S.C. §216(b); App.58.[3]

In short, whether examined generally or in light of the specific state-law claims alleged in this case, the

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[3] Because substantive state law does not reach the OCS, Newton's seventh claim, for civil penalties under California's private-attorney-general statute, also fails.

FLSA is fully applicable to the OCS and to Newton's claims and leaves no gaps for state law to fill. Thus, California's wage-and-hour law is not "applicable" as surrogate federal law. Just as DOHSA's application to the OCS would have rendered state law inapplicable in *Rodrigue*, 395 U.S. at 359, and just as the Longshore and Harbor Workers' Compensation Act's application to the OCS rendered state law inapplicable in *Nations*, 483 F.2d at 589, the FLSA's application to the OCS renders state law inapplicable here. As a result, the FLSA is plaintiffs' "exclusive remedy," *Rodrigue*, 395 U.S. at 359, and the decision below should be reversed.

B. California's Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes.

Even if, contrary to OCSLA and this Court's cases, state law could be deemed "applicable" as surrogate federal law despite the absence of a gap in federal law, the decision below would still be wrong because California wage-and-hour laws are "inconsistent with" the FLSA for OCSLA purposes. 43 U.S.C. §1333(a)(2)(A). As described above, each of the state-law provisions that Newton invokes has an FLSA counterpart that regulates the same topic in a different way. Indeed, if the FLSA were consistent with state law on these issues, Newton presumably would have filed his claims under the FLSA instead of swimming upstream against the then-settled law established in *Continental Oil*.

The Ninth Circuit openly acknowledged that "California's minimum wage and overtime laws ... establish different and more generous

benchmarks than the ... FLSA's statutory and regulatory scheme." App.36-37. It held, however, that the differences between the two statutory schemes did not make them "inconsistent" for OCSLA purposes. App.35-36. In the court's view, California's wage-and-hour laws are consistent with the FLSA because the FLSA allows states to enact higher minimum-wage requirements and lower maximum workweek requirements. App.36; *see* 29 U.S.C. §218(a). In other words, the court held that California's wage-and-hour standards are "not inconsistent with" the very different rules under the FLSA because the latter does not preempt the former.

That conclusion reflects a fundamental misunderstanding of OCSLA's "not inconsistent with" standard. While the FLSA does not preempt state and local laws where they apply of their own force based on an exercise of the residual sovereignty of the states, that is irrelevant under OCSLA because state law *never* applies of its own force under OCSLA. When OCSLA borrows state law standards, it adopts them "as the law of the United States." *Rodrigue*, 395 U.S. at 356. Thus, whether the FLSA would preempt state law is not just irrelevant, but a fundamentally wrong question to ask. When Congress includes a savings clause in a statute like the FLSA, it does so out of the federalism-friendly impulse not to displace the residual sovereignty of the states. But such impulses are fundamentally misplaced on the OCS, where Congress has already made a deliberate judgment to reaffirm exclusive federal sovereignty and make all applicable law federal law. Put differently, Congress' decision in the FLSA to "save" the applicability of California law to Fresno says nothing about Congress'

very different decision in OCSLA to make federal law exclusive on the OCS.

Once it is clear that preemption principles are inapposite and the question under OCSLA is whether two *federal* regulatory regimes are consistent, the Ninth Circuit's error comes into sharp relief. If California's wage-and-hour law were incorporated into federal law, federal law would be riddled with contradictions; federal law would simultaneously require and not require employers to pay employees for their off-duty time on the platform, and simultaneously impose a minimum wage of $7.25 per hour and $11.00 per hour. While it would not be impossible to comply with both *federal* regimes, to say the two regimes are consistent would be to distort meaning and disregard Congress' evident intent in enacting OCSLA.

Finally, the Ninth Circuit's decision establishes the exact choice-of-law regime that Congress rejected. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."). In the Ninth Circuit's view, state law controls on the OCS whenever it is not preempted. But that is exactly how the law applies within the borders of States: state law presumptively applies unless preempted by federal law. And Congress expressly repudiated proposals that would have treated the OCS as if it were part of the adjacent state. *See* p.7, *supra*. The Ninth Circuit's decision is thus contrary to the distinctive regime that Congress established for the OCS, underscoring the need for this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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APPENDIX

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Appendix B

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56352

BRIAN NEWTON, an individual,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD., Erroneously Sued As Parker Drilling Management Services, Inc.,

Defendant-Appellee,

and

PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation,

Defendant.

Argued and Submitted: Mar. 7, 2017
Filed: Feb. 5, 2018

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges

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OPINION

CHRISTEN, Circuit Judge:

This case presents the novel question whether claims under state wage and hour laws may be

brought by workers employed on drilling platforms fixed on the outer Continental Shelf. Brian Newton worked on such a platform off the coast of Santa Barbara. His shifts lasted fourteen days and he regularly worked twelve hours per day. After Parker Drilling ("Parker") terminated him, Newton sued in state court for wage and hour violations under California law. Parker removed the case to federal district court and filed a motion for judgment on the pleadings. The district court granted the motion, concluding that the Fair Labor Standards Act is a comprehensive statutory scheme that is exclusive of California wage and hour laws. Newton appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We hold that the absence of federal law is not, as the district court concluded, a prerequisite to adopting state law as surrogate federal law under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A). We thus reject the proposition that "necessity to fill a significant void or gap," *Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F. 2d 1030, 1036 (5th Cir. 1969), is required in order to assimilate "applicable and not inconsistent," 43 U.S.C. § 1333(a)(2)(A), state law into federal law governing drilling platforms affixed to the outer Continental Shelf. We therefore vacate the district court's dismissal of Newton's claims and remand for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Newton worked as a roustabout and painter for Parker on drilling platforms in the Santa Barbara Channel from approximately January 2013 to January 2015. It is uncontested that the drilling

platforms where he worked were located more than three miles offshore and fixed to the seabed of the outer Continental Shelf. His fourteen-day shifts, known in the industry as "hitches," comprised twelve hours on duty followed by twelve hours on "controlled standby." Newton was paid for twelve hours of work per day and he was not able to leave the platform during his shifts. Newton alleges that he usually took fifteen to thirty minutes during his shifts to eat without clocking out or ate while not working and remaining on call, and that Parker did not provide thirty-minute meal periods for each five hours worked, as required by California law. Parker paid Newton twice per month. In addition to compensation for twelve hours per day, his pay stubs showed pay for "two hours for the boat ride out, back and debriefing with the next crew."

Newton filed a putative class action in California state court on February 17, 2015. Although Parker paid an hourly rate well above California and federal minimum wage, Newton maintained that California law required Parker to pay him for the twelve hours he was on controlled standby each day. The First Amended Complaint (FAC) alleged that Newton's final paycheck did not include all the wages owed to him, "including the overtime/doubletime and meal period wages." In all, Newton brought seven causes of action under California law for: (1) minimum wage violations; (2) failure to pay overtime and doubletime; (3) pay stub violations; (4) failure to pay timely final wages; (5) failure to provide lawful meal periods; (6) civil penalties under the Private Attorney General Act of 2004 (PAGA); and (7) unfair competition.

Parker removed the action to federal court and filed a motion for judgment on the pleadings. Parker argued that, under the Outer Continental Shelf Lands Act, 43 U.S.C. § § 1331-1356b (OCSLA), the Fair Labor Standards Act (FLSA) is a comprehensive statutory scheme that leaves no room for state law to address wage and hour grievances arising on the OCS.[1] For his part, Newton contended that California's more protective wage and hour laws may be applied concurrently with the minimum guarantees of their federal counterpart. *See* 29 U.S.C. § 201, *et seq*. Newton's opposition did not explain the complaint's allegation that some of Parker's allegedly unlawful conduct occurred in California rather than on the OCS, but did request that if the district court were to grant Parker's motion, it do so "without prejudice to allow Plaintiff to correct any deficiencies."[2]

The district court granted Parker's motion for judgment on the pleadings, reasoning that "under [the] OCSLA, federal law governs and state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." Finding no significant voids or gaps in the FLSA, the district court held that Newton could not invoke California wage and hour

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[1] We collectively refer to the outer Continental Shelf and the devices attached to it for the purposes enumerated in the statute as "the OCS."

[2] The FAC alleged, without elaboration, that "the unlawful employment practices complained of herein occurred in the City of Goleta, California, County of Santa Barbara." On appeal, Newton argues that "at least some of the alleged California wage-and-hour violations took place on vessels to and from California's coast and on the coast of California."

laws as surrogate federal law. The district court reached this decision after considering the Department of Labor (DOL) regulations elaborating the FLSA. While recognizing that the FLSA has a savings clause that expressly allows for more protective state minimum wage and overtime laws, the district court nevertheless concluded that California wage and hour claims were unavailable to Newton. The district court did not address Newton's request for leave to amend. Newton timely appealed.

II. Standard of Review

A dismissal on the pleadings pursuant to Rule 12(c) is reviewed *de novo*. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011). "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

III. Discussion

Except for any claims that may have arisen while Newton was transiting to and from the offshore drilling platforms where he worked, Newton's grievances relate to his employment on the OCS, and the parties agree that the fate of Newton's appeal rests on the OCSLA's choice of law provision. *See* 43 U.S.C. § 1333(a)(2)(A).

A. The Outer Continental Shelf Lands Act

1. OCSLA's Choice of Law Provision

The outer Continental Shelf generally refers to submerged lands lying more than three miles offshore, outside the territorial jurisdiction of the states. *See* 43

U.S.C. §§ 1331(a), 1301(a)(2); *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010). Subject to certain exceptions and conditions, the OCSLA declares that the Constitution and laws of the United States extend to the outer Continental Shelf, as well as "*all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed* . . . for the purpose of exploring for, developing, or producing resources therefrom . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. § 1333(a)(1) (emphasis added). OCSLA's assertion of jurisdiction is unique because it comprises the ocean floor but not the waters above it. "[T]he jurisdiction asserted is a 'horizontal jurisdiction' and does not affect the status of superjacent waters." Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 34 (1953) (citing S. Rep. No. 83-411, at 2 (1953)). The OCSLA's choice of law provision declares:

> To the extent that they are *applicable and not inconsistent* with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, *the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of*

> *the outer Continental Shelf*, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area.

43 U.S.C. § 1333(a)(2)(A) (emphasis added). Because the OCSLA makes plain that the laws of the adjacent state are to apply to drilling platforms fixed to the seabed of the outer Continental Shelf as long as state law is "applicable and not inconsistent with . . . Federal laws," the parties' dispute turns on the interpretation of the terms "applicable" and "not inconsistent." *Id.*

The Supreme Court has not been called upon to decide a case involving wage and hour laws on the OCS. Both Newton and Parker ask us to look to the Fifth Circuit's interpretation of the OCSLA for guidance. Though the parties disagree as to the Fifth Circuit's prevailing test for choice of law on the OCS, they both argue that we ought to follow the Fifth Circuit's lead and adopt the approach it has taken in cases involving injury, wrongful death, and contract claims arising on the OCS. Newton urges that the Fifth Circuit's test is the one set out in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990) (*PLT*). According to Newton, platform workers may bring state wage and hour claims to the extent that state law is not inconsistent with existing federal law, *see Breton Energy, L.L.C. v. Mariner Energy Res., Inc.*, 764 F.3d 394, 398 (5th Cir. 2014), and California's wage and hour laws are not inconsistent with the FLSA insofar as they are preserved by the FLSA's savings clause. Relying on *Continental Oil*, 417 F.2d at 1036, Parker argues that

the FLSA is a comprehensive statutory and regulatory scheme that leaves no voids or gaps for state law to fill, so state wage and hour laws do not apply on the OCS and Newton's grievances may be redressed only by the FLSA.

Having examined the text of the original OCSLA and its 1975 amendment, the legislative history, and the Supreme Court's case law addressing the Act, we hold that state wage and hour laws are adopted as surrogate federal law on the OCS as long as they are "applicable and not inconsistent" with existing federal law.

2. Origins of the OCSLA

"The OCSLA grew out of a dispute, which first developed in the 1930's, between the adjacent States and the Federal Government over territorial jurisdiction and ownership of the OCS and, particularly, the right to lease the submerged lands for oil and gas exploration." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). Passed in 1953,"[t]he purpose of the [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as [drilling platforms] on the outer Continental Shelf." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969).

Congress initially considered extending maritime law to the OCS, but it envisioned that 10,000 or more people might eventually be employed on the OCS to develop mineral resources.[3] *See* 99 Cong. Rec. 6963-64

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[3] "[L]arge crews of men will work on the miraculous structures which will rise from the sea bed of the outer Continental Shelf. These men will die, leave wills, and pay taxes. They will fight,

(1953); *Shell Oil*, 488 U.S. at 27 n.8. Anticipating a broad range of activity associated with this mineral resource development, Congress feared that federal law, standing alone, would be inadequate because it "was never designed to be a complete body of law in and of itself." 99 Cong. Rec. 6963 (1953). Congress also rejected the incorporation of the OCS into the boundaries of the several states, *see* S. Rep. No. 83-411, at 6 (1953), deciding instead that existing federal law and the law of the abutting state (except for state taxation laws)[4] were to comprise the body of law governing the OCS. Because the Department of Justice and several members of Congress voiced concerns that the prospective incorporation of state laws on the OCS might be an unconstitutional delegation of Congress's legislative authority, S. Rep. No. 83-411, at 33 (1953); *see* 99 Cong. Rec. 6963-64 (1953), the OCSLA only borrowed state law then in existence.[5] Thus, as originally adopted in 1953,

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gamble, borrow money, and perhaps even kill. They will bargain over their working conditions and sometimes they will be injured on the job. . . . the whole circle of legal problems familiar to the upland could occur on these structures." Christopher, *supra*, at 37.

[4] 43 U.S.C. § 1333(a)(2)(A) provides: "State taxation laws shall not apply to the outer Continental Shelf."

[5] As explained by Senator Cordon while introducing the bill to the Senate: "The enactment as Federal law by reference of the laws of the several abutting States meets the major constitutional objection, in that the laws so adopted are the laws as they exist at the time of the enactment of S. 1901. Only already existing State laws will become the law of the United States, and the amendatory legislation by the States thereafter will not be applicable, unless made so by later Federal legislation." 99 Cong. Rec. 6963-64 (1953); *see also* Christopher, *supra*, at 42.

"applicable" state law for purposes of § 1333(a)(2)(A) referred to state non-tax law, in existence on the effective date of the Act, that bore on the relevant subject matter.

The "applicable" state law for purposes of § 1333(a)(2)(A) changed in 1975 when Congress enacted the Deepwater Port Act, 33 U.S.C. §§ 1501, *et seq.*, and simultaneously amended the OCSLA, *see* Pub. L. No. 93-627, § 19(f), 88 Stat. 2176 (1975). By then, *United States v. Sharpnack*, 355 U.S. 286 (1958), had allayed the concern that the prospective adoption of state law might amount to an unconstitutional delegation of congressional legislative authority.[6] The 1975 amendment redefined state law in § 1333(a)(2)(A) as "the civil and criminal laws of each adjacent State, now in effect *or hereafter adopted, amended, or repealed.*" § 1333(a)(2)(A) (emphasis added). This amendment ensured that the same law governed resource development structures on the OCS and deep water ports.[7] The OCSLA's choice of law

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[6] In *Sharpnack*, the Supreme Court sustained the Assimilative Crimes Act of 1948 (Crimes Act) against the challenge that Congress, in enacting the Crimes Act, impermissibly delegated its legislative authority to the states. 18 U.S.C. § 13; 355 U.S. at 286. The Crimes Act makes the version of state law enforceable at the time of allegedly unlawful conduct applicable, in conjunction with federal criminal law, on federal enclaves. *Sharpnack* explained that Congress's "deliberate continuing adoption" of state criminal law for federal enclaves does not rise to an unconstitutional delegation of legislative authority to the states because Congress always has the power to exclude a state law from the scope of the Crimes Act. 355 U.S. at 294.

[7] As explained in the Joint Report of the Committees on Commerce, Interior and Insular Affairs, and Public Works to the Senate, the Department of Justice sought the 1975 amendment

provision has not undergone significant statutory amendments since 1975.

3. Judicial Interpretation of the OCSLA

The Supreme Court first applied the OCSLA's choice of law provision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969). The families of two workers who perished on drilling rigs fixed to the outer Continental Shelf off the Louisiana coast brought claims pursuant to Louisiana state law and the Death on the High Seas Act (High Seas Act). 395 U.S. at 352-53 (1969); *see* 46 U.S.C. §§ 30301-08. The High Seas Act provides an admiralty remedy for deaths resulting from traditional maritime activity on the high seas, i.e., in waters three or more nautical miles from shore. *See Rodrigue*, 395 U.S. at 359. The trial courts in the two cases that were consolidated in the *Rodrigue* appeal dismissed the state wrongful death claims, ruling that the federal statutory remedy was exclusive. *Id.* at 353-54. The Fifth Circuit affirmed that ruling, but the Supreme Court reversed. *Id.* at 355. The Supreme Court explained that the OCSLA requires fixed drilling platforms to be treated as artificial islands or federal enclaves within a landlocked state, not as vessels. *Id.* As such, "the [federal] admiralty action under the [High] Seas Act no more applies to these accidents actually occurring

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to the OCSLA because, "from an enforcement point of view," it wanted the same law applied to all deepwater ports and structures erected on the OCS, *see* S. Rep. No. 93-1217, at 76 (1974), and "no provision was made in the Outer Continental Shelf Lands Act to apply State laws as adopted, amended or repealed, *after* the date of enactment of that Act." *Id.* at 60.

on the islands than it would to accidents occurring in an upland federal enclave."[8] *Id.* at 366. Moreover, since the accidents befalling the workers "involved no collision with a vessel, and the structures were not navigational aids," their deaths were not attributable to traditional maritime activity. *Id.* at 360. Hence, the High Seas Act's maritime remedy was unavailable, and "any obstacle to the application of state law by incorporation as federal law through [§ 1333(a)(2)]" was "remove[d]." *Id.* at 366.

In reaching this result, *Rodrigue* first examined the language of § 1333(a)(2), which, as originally enacted, expressly incorporated then-existing state laws "[t]o the extent that they are applicable and not inconsistent" with federal law. *See id.* at 356 n.3 (quoting 43 U.S.C. § 1333(a)(2)(A)). The Supreme Court concluded from its analysis of the text that "federal law is 'exclusive' in its regulation of [the OCS], and that state law is adopted only as surrogate federal law." *Id.* at 357. From the Senate Committee Report, the Conference Report, and the debate on the floor of the Senate, the Court found support for "[t]he principles that federal law should prevail, and that state law should be applied only as federal law and then only when no inconsistent federal law applie[s]". *Id.* at 357-59 (citing S. Rep. No. 83-411, at 11 (1953); H.R. Conf. Rep. No. 1031, 83d Cong., 1st Sess., 12

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[8] "[A] state may not legislate with respect to a federal enclave unless it reserved the right to do so when the state gave its consent to the purchase by the United States[;] only state laws existing at the time of the acquisition remain enforceable. Subsequent state laws are only enforceable if Congress provides for assimilation of later-enacted state controls." 3 William J. Rich, *Modern Constitutional Law* § 34:49 (3d ed. 2016).

(1953); 99 Cong. Rec. 6962-63, 7164, 7232-36 (1953)). "This legislative history buttresse[d] the Court of Appeals'[s] finding that in view of the inconsistencies between the state law and the [High] Seas Act, the [High] Seas Act remedy would be exclusive if it applied." *Id.* at 359.

But the High Seas Act remedy did not apply. The Supreme Court recounted that while introducing the OCSLA bill to the Senate, Senator Cordon explained that the Committee on Interior and Insular Affairs initially attempted to "provide housekeeping law" for the OCS by treating drilling platforms as vessels subject to maritime law. *Rodrigue*, 395 U.S. at 361 (quoting 99 Cong. Rec. 6963 (1953)). The Committee, however, eschewed this approach because "[t]he so-called social laws necessary for protection of the workers and their families would not apply[, including] such things as unemployment laws, industrial-accident laws, fair-labor-standard laws, and so forth. Ultimately, instead, the whole body of Federal law was made applicable to the area as well as state law where necessary." *Id.* at 362 (original alterations and quotation marks omitted). The *Rodrigue* court concluded from its "[c]areful scrutiny of the hearings which were the basis for eliminating from the [OCSLA] the treatment of artificial islands as vessels . . . that the motivation for this change, together with the adoption of state law as surrogate federal law, was the view that maritime law was inapposite to these fixed structures." *Id.* at 363. In sum, *Rodrigue* dispelled the misconception that maritime law applied perforce to drilling platforms on the outer Continental Shelf. Since federal law made

no provision for wrongful death claims on the OCS,[9] the Supreme Court held that the OCSLA adopted state law as the applicable surrogate federal law. *Id.* at 365-66.

Notably, *Rodrigue* did not require the court to address a situation where state law *and* existing federal law made provisions for the type of claim asserted; no relevant federal cause of action for wrongful death existed. *Rodrigue* is therefore of faint value for resolving a case like the instant one, where both state and federal law are potentially applicable to Newton's wage and hour grievances.

The Supreme Court revisited the OCSLA choice of law provision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Huson filed a personal injury suit against a non-employer defendant, Chevron, for damages arising from a back injury he suffered while working on Chevron's artificial island drilling rig on the outer Continental Shelf. *Id.* at 98. The parties' dispute centered on the timeliness of the plaintiff's claims. *Id.* The Fifth Circuit resorted to the federal admiralty doctrine of laches, but the Supreme Court reversed, holding that Louisiana's one-year statute of

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[9] The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.*, provides a federal remedy for a non-seaman maritime employee to recover against an employer for personal injuries. *See Figueroa v. Campbell Indus.*, 45 F.3d 311, 315 (9th Cir. 1995). The OCSLA extends the LHWCA to the OCS, 43 U.S.C. § 1333(b), but defendants in *Rodrigue* were not the workers' employers. *See Rodrigue*, 395 U.S. at 354.

limitations should have controlled.[10] *Id.* at 105. The *Huson* court explained that in enacting the OCSLA, Congress expressed an intent for courts to fill "gaps" in existing federal law by applying state law, not by creating federal common law. *Id.* at 104-05 (internal quotation marks omitted). Like *Rodrigue*, *Huson* did not resolve a claimed inconsistency between potentially applicable state and federal laws. Nor did *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207 (1986), which considered whether the High Seas Act or state law governed wrongful death actions brought after a helicopter transporting two OCS platform workers crashed into the sea. *Id.* at 209. Starting from the observation that the text of the OCSLA precludes its application to the high seas over the outer Continental Shelf, the Supreme Court rejected "the proposition that it is the decedent's status or his special relationship with the shore" that triggers OCSLA's choice of law provision in § 1333(a)(2)(A), "regardless of the location of the accident." *Id.* at 219. Locale is key, and because "the fatalities underlying [the] suit . . . occurred on the high seas" rather than on the OCS, the High Seas Act—not the OCSLA—controlled. *Id.* at 220.

Surveying the Supreme Court's OCSLA jurisprudence, we conclude that there are three questions that must be asked in any case involving choice of law under § 1333(a)(2)(A) of the OCSLA. First, the threshold question is whether the situs of the controversy is the OCS. *See Tallentire*, 477 U.S. at

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[10] Because Huson initiated his action before the Supreme Court announced its decision in *Rodrigue*, the Court declined to apply this holding to his claims. *Huson*, 404 U.S. at 99-100.

218-19; *cf. Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 222 (2012) (holding that in contrast to § 1333(a)(2)(A), the OCSLA's provision for workers' compensation, § 1333(b), covers employees who can establish a "substantial-nexus" between their injury and extractive operations on the OCS). If the situs is not the OCS, the OCSLA's choice of law provision cannot apply. *See Tallentire*, 477 U.S. at 220. Second, if the situs is the OCS, we then ask whether there is any federal law applicable to the dispute. *See Rodrigue*, 395 U.S. at 366. If there is not, then state law generally applies. *See id.*; *Huson*, 404 U.S. at 101. Third, if there is federal law applicable to the dispute, then we "must consider the content of both potentially applicable federal and state law" and ask whether any applicable state law is inconsistent with federal law. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981). As a contemporary commentator on the OCSLA presciently warned, "[w]hich state laws 'are applicable and not inconsistent' with federal laws and regulations will be open to constant interpretation and controversy." Christopher, *supra*, at 42.

The "seemingly innocuous extension of state law raised to the status of surrogate federal law raises extremely complex questions of interpretation[,]" particularly in addressing choice of law. 1 Thomas J. Shoenbaum, *Admiralty & Maritime Law* § 3-9 (5th ed. 2016). The Fifth Circuit has elaborated two strands of jurisprudence stemming from *Rodrigue*. According to the Fifth Circuit's *Continental Oil* line of cases, "the recurring theme of *Rodrigue* 'requires that "applicable" [state law] be read in terms of necessity—necessity to fill a significant void or gap'" in existing federal law. *Nations v. Morris*, 483 F.2d 577, 585 (5th

Cir. 1973) (quoting *Cont'l Oil*, 417 F.2d at 1036). The Fifth Circuit last applied the *Continental Oil* test in 1985 in *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506, 509 (5th Cir. 1985) (per curiam),[11] where the court considered whether a drilling platform worker could maintain a Louisiana retaliatory discharge action even though the Longshore and Harbor Workers' Compensation Act (LHWCA) provides a federal remedy for retaliatory discharge. LeSassier was a platform worker who had been injured on an outer Continental Shelf platform. *LeSassier*, 776 F.2d at 507. After filing a successful claim for benefits under the LHWCA, LeSassier was fired. *Id.* He brought a state law action against his former employer alleging retaliatory discharge, but the district court concluded LeSassier could not rely on state retaliatory discharge law. *Id.* The Fifth Circuit affirmed, holding that "no gap" in federal law existed because "Congress provided a specific statutory provision [in the LHWCA] (33 U.S.C. § 948a) to address retaliatory discharges." *Id.* at 509. The court of appeals declined to "selectively apply[] only those parts of the overall LHWCA statutory structure which [LeSassier] happen[ed] to favor and ignore less favorable provisions." *Id.* at 508. In Parker's view, *Continental Oil* and its progeny establishes that, at least in the Fifth Circuit, state law is only applicable on the OCS if it is necessary to resort to state law to fill a gap or

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[11] The *Continental Oil* test was also briefly alluded to in the footnotes of two later cases: *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 777 n.4 (5th Cir. 1988) and *Mesa Operating Ltd. v. U.S. Dep't of Interior*, 931 F.2d 318, 325 n.48 (5th Cir. 1991).

void in federal law. Parker urges us to adopt such a rule.

Newton advocates for the adoption of the *PLT* test as applied in the Fifth Circuit's more recent lines of cases. The *PLT* test distills *Rodrigue* thus: "[F]or state law to apply as surrogate federal law, three conditions must be met: '(1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil seabed, or artificial structures permanently or temporarily attached thereto)[;] (2) Federal maritime law must not apply of its own force[;] (3) [t]he state law must not be inconsistent with Federal law.'" *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783 (5th Cir. 2009) (en banc) (quoting *PLT*, 895 F.2d at 1047). The Fifth Circuit applied the third prong of this test in *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996), *overruled on other grounds by Grand Isle Shipyard*, 589 F.3d at 788 n.8. *Hodgen* arose from an accident suffered by an operator while executing a swing rope transfer from a OCS platform to a vessel. 87 F.3d at 1516. The operator settled his personal injury claims against the defendants who then litigated questions of comparative fault and indemnity between themselves. *Id.* at 1517. An agreement between the operator's employer and the charterer contained a clause requiring the former to indemnify the latter for costs and damages, but the Louisiana Oilfield Indemnity Act (LOIA) forbade any such transfer of liability. *Id.* at 1522. The charterer argued that the LOIA should not be adopted as surrogate federal law because it was inconsistent with federal law. *Id.* at 1528. The Fifth Circuit, relying on its prior decision in *Knapp v. Chevron USA, Inc.*, 781 F.2d 1123 (5th Cir. 1986), summarily rebuffed this contention.

Hodgen, 87 F.3d at 1528. *Knapp* concluded that because the 1984 amendments to the LHWCA were silent as to indemnity agreements addressing injuries caused by the negligence of non-vessels and nothing signaled Congress's intent that the amendments should "preempt the field," Louisiana's Oilfield Indemnity Act was not inconsistent with federal law and, therefore, the OCSLA "makes [the LOIA] the applicable surrogate law on fixed platforms offshore Louisiana." *Knapp*, 781 F.2d at 1131. *Hodgen* and *Knapp* suggest that the Fifth Circuit's *PLT* test looks to congressional intent regarding preemption to determine whether state law is inconsistent with a federal statutory scheme.

It remains unclear whether the *PLT* test has superseded the *Continental Oil* test in the Fifth Circuit, or whether the Fifth Circuit views the *Continental Oil* test as a precursor to the *PLT* test, such that the *PLT* conditions come into play only if there is a significant gap or void in federal law. *See Tetra Techs., Inc. v. Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016). Despite questions about the *PLT* test, in respects not here pertinent,[12] Newton argues that

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[12] *See Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 214 (5th Cir. 2013) (Clement, J., writing for herself) ("Although the application of maritime law under OCSLA may be contrary to the intention of Congress, we are bound by our precedent to apply maritime law as the substantive rule of decision where it otherwise applies 'of its own force.'"); *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 505 n.2 (5th Cir. 2002) (DeMoss, J., dissenting) (noting that "there is no statutory basis" for examining whether maritime law applies of its own force under the second prong of the *PLT* test), *overruled on other grounds by Grand Isle Shipyard*, 589 F.3d at 788 n.8.

the *PLT* test should be adopted as the law of the Ninth Circuit.

B. The Instant Case

1. Newton's Claims under California Minimum Wage and Overtime Law

Parker paid Newton an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime hours. Newton's principal wage and hour objection is that he was not properly compensated for standby hours on the drilling platform. We know of no appellate case law examining whether, for the purposes of the OCSLA, state wage and hour laws are inconsistent with the federal Fair Labor Standards Act.[13]

a. Text and Legislative History of the OCSLA

To resolve the issue of first impression presented by Newton's appeal, "[w]e start, as we must, with the language of the statute[,]" *Bailey v. United States*, 516 U.S. 137, 144 (1995). "[W]hen the statute's language

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[13] District courts within the Ninth Circuit have considered whether California wage and hour laws apply as surrogate federal law on the OCS. *See, e.g.*, *Williams v. Brinderson Constructors Inc.*, No. CV 15-2474- MWF(AGRx), 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015); *Reyna v. Venoco, Inc.*, No. CV 15-4525 PA (RAOx) (C.D. Cal. October 23, 2015); *Espinoza v. Beta Operating Co.*, No. CV 15-04659-RGK (ASx) (C.D. Cal. Oct. 29, 2015); *Jefferson v. Beta Operating Co.*, No. CV 15-04966 SJO (PLAx) (C.D. Cal. Nov. 3, 2015); *Garcia v. Freeport-McMoran Oil & Gas LLC*, No. CV 16-4320-R (C.D. Cal. Sept. 16, 2016). Except where parties contractually agreed for state law to control, these district courts concluded that California's wage and hour laws do not extend to OCS platform workers because the FLSA leaves no gap for state law to fill.

is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted).

The OCSLA makes the laws of the adjacent state, "[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the law of the United States." 43 U.S.C. § 1333(a)(2)(A). "[W]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Burns v. Alcala*, 420 U.S. 575, 580 (1975). In its *ordinary* sense, "applicable" state law, as that term was employed in the 1953 version of the statute, means the non-tax law of the abutting state—frozen in time—that pertained to the subject matter at hand. *See, e.g.*, *Applicable*, Funk & Wagnalls Standard Dictionary of the English Language (1958) ("Capable of or suitable for application; relevant; fitting"). The 1975 amendment to the OCSLA did not change the significance of the word "applicable," except that the state laws to be adopted became "the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed." 43 U.S.C. § 1333(a)(2)(A); *see, e.g.*, *Applicable*, Webster's New World Dictionary of the American Language (1972) ("that can be applied; appropriate"). Thus, we first observe that the "ordinary, contemporary, common meaning," *Williams v. Taylor*, 529 U.S. 420, 431 (2000), of "applicable" does not lend itself to the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law.

Moreover, we generally "presume [that] Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016). Congress could have said "necessary," or employed words to that effect, in § 1333(a)(2)(A). In another statute, Congress authorized the courts to borrow state common law where "the laws of the United States . . . are not adapted to the object [of the applicable federal statutes], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law[.]" 42 U.S.C. § 1988(a). Congress did not make any such qualification here.

Legislative history, however pellucid, cannot rewrite the language of a statute, *Am. Rivers v. FERC*, 201 F.3d 1186, 1204 (9th Cir. 1999), but "clear evidence of congressional intent may illuminate ambiguous text." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

The Fifth Circuit in *Continental Oil* navigated OCSLA's choppy waters by taking legislative history as its lodestar. 417 F.2d at 1034-36. *Continental Oil* noted the "deep political and emotional currents centered around the clash between national sovereignty and states' rights" during the passage of the OCSLA and Congress's "express reject[ion]" of the "notion of supremacy of state law administered by state agencies." *Id.* at 1036. The Fifth Circuit concluded that "the deliberate choice of federal law, federally administered, requires that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Id.* (footnote omitted).

The legislative history indicates that Congress was solicitous to retain and indeed, assert, the federal

government's civil and political jurisdiction over the OCS, but we are not persuaded that this consideration justifies judicial substitution of "necessary" for the actual statutory term, "applicable." These two terms are manifestly different, and the latter does not connote the former. The OCSLA commands us to give force to "applicable and not inconsistent" state laws as surrogate federal law. 43 U.S.C. § 1333(a)(2)(A). By following the course charted by the OCSLA, we do not accord state law supremacy over federal law, nor cede the United States' jurisdiction over the OCS to state agencies. We simply acknowledge, as the Supreme Court did in *Rodrigue*, 395 U.S. at 355-56, that Congress adopted state law as surrogate federal law for the OCS, so long as it is "applicable and not inconsistent with" existing federal law.

Nor do we find in the legislative history a clear intent on the part of Congress to require a "significant void or gap" in federal legislation or regulation, meaning the complete absence of any federal law, as a prerequisite to the application of state law. Indeed, Senator Cordon, the floor manager of the bill, noted that the contemplated extension of admiralty law to the OCS was unsatisfactory because:

> The so-called social laws necessary for protection of the workers and their families would not apply. I refer to such things as unemployment laws, industrial-accident laws, fair-labor-standard laws, and so forth. It was necessary that the protection afforded by such laws be extended to the outer Shelf area because of the fact that ultimately some

> 10,000 or more men might be employed in mineral-resource development there.

99 Cong. Rec. 6963 (1953); *see Rodrigue*, 395 U.S. at 362. Read in context, Senator Cordon's statements emphasized the importance of having state law apply to the OCS, and do not indicate that state laws had to be necessary to fill gaps or voids in federal law *before* they would be adopted as surrogate federal law. *See Rodrigue*, 395 U.S. at 363. As Senator Cordon went on to explain:

> [T]he legal situation [of the OCS] is comparable to that in areas owned by the Federal Government under the exclusive jurisdiction of the Federal Government and lying within the boundaries of a State in the uplands.
>
> As a part of the same amendment, the [Senate Committee on Interior and Insular Affairs] provided, first, that the laws of abutting States should become a part of the Federal law within such areas opposite the States as would have been included in the States were their boundaries extended to the edge of the Continental Shelf.
>
> . . . .
>
> The outer Continental Shelf will have the protection of the Constitution itself, *and will have the protection and provision for conduct of affairs as given by the laws of each of the abutting States* within the area immediately opposite that State.

99 Cong. Rec. 6963-64 (1953) (emphasis added); *see* S. Rep. No. 83-411, at 11 (1953).

Read in isolation, some remarks by Senators Anderson and Long seem to endorse the idea that state law was to speak as federal law only where existing federal law was "silent" or otherwise left a "void." 99 Cong. Rec. 7257, 7164 (1953). But "scattered floor statements by individual lawmakers . . . [are] 'among the least illuminating forms of legislative history.'" *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017) (quoting *NLRB. v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017)); *see Shell Oil*, 488 U.S. at 29 ("We . . . find that Shell's reliance on an isolated statement by Senator Long," who was a "vocal opponent of the OCSLA," "is misplaced."); *see also Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999) ("This circuit relies on official committee reports when considering legislative history, not stray comments by individuals . . . ."). Here, the legislative history is at best muddled, as illustrated by the following exchange between Senator Cordon, the floor manager of the bill, and Senator Daniel:

> Mr. DANIEL: . . . *Since we have applied State laws in the fields which are not covered by Federal laws or by regulations* of the Secretary of the Interior, I should like to ask the Senator from Oregon whether he understands that State laws relating to conservation will apply in this area until and unless the Secretary of the Interior writes some rule or regulation to the contrary.

> Mr. CORDON: There can be no question about that; the Senator's statement is correct. *The language clearly adopts State law as Federal law where it is not inconsistent with existing Federal law or with the rules and regulations of the Secretary of the Interior*: and, of necessity, the inconsistency with respect to rules and regulations of the Secretary of the Interior must be in the case of those rules and regulations which it is within the power of the Secretary of the Interior to adopt.
>
> When he has adopted them, those rules and regulations *must be inconsistent with or in conflict* with the conservation laws of the States, which are then the conservation laws of the United States with respect to that particular area, *or else the laws of the States, having been adopted by the United States, apply to that area.* There can be no question about it.

99 Cong. Rec. 7264 (1953) (emphasis added). We cannot allow "ambiguous legislative history . . . to control the ordinary meaning of [the] statutory language." *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1172 (9th Cir. 1979) (citing *NLRB v. Plasterer's Local No. 79*, 404 U.S. 116, 129-30 (1971)); *see Milner*, 562 U.S. at 572. Reading the plain text of the OCSLA against the background of its inconclusive legislative history, we are not convinced that state law applies as surrogate federal law on the OCS only if "necess[ary]," *Cont'l Oil*, 417 F.2d at 1036,

in the sense that there is no existing federal law on the subject.

We do not understand the Supreme Court to have instructed otherwise. Although the Fifth Circuit has sometimes described "necessity to fill a significant void or gap" as the "recurring theme of *Rodrigue*," *Nations*, 483 F.2d at 585 (internal quotation marks omitted); *Cont'l Oil*, 417 F.2d at 1036, the issue actually decided by *Rodrigue* was whether federal admiralty law applied on OCS platforms, 395 U.S. at 360, 366. *Rodrigue* established that, absent a maritime nexus, federal admiralty law does not extend to the OCS. *Id.* at 359-60. State law was deemed the law governing the two wrongful death actions in *Rodrigue*, but there was no competing applicable federal law, *id.* at 366, and the Supreme Court has not yet squarely confronted a situation where, as here, a state statutory scheme and an existing federal statutory scheme are both "potentially applicable" to a civil suit arising on the OCS. *Cf. Gulf Offshore*, 453 U.S. at 486-87.

b. The Meaning of "Not Inconsistent"

As we see it, because there are California and federal statutory schemes that are "applicable," in the ordinary sense of that term, to the parties' conflict, the determinative question in Newton's case is not which law is "applicable," but whether California wage and hour laws are "inconsistent with" existing federal law. 43 U.S.C. § 1333(a)(2)(A). If they are not inconsistent, the OCSLA dictates that state wage and hour grievances should be redressable as federal claims on the OCS.

We recently examined the usual meaning of "inconsistent" in *Ecological Rights Foundation v. Pacific Gas & Electricity Co.*, 874 F.3d 1083 (9th Cir. 2017), where we concluded that laws are inconsistent if they are mutually "incompatible, incongruous, [or] inharmonious." *Id.* at 1095 (quoting Webster's Third New International Dictionary (1971)).[14]

To further articulate a framework for deciding whether a state law is inconsistent with federal law under the OCSLA, we draw on cases that have arisen in the context of two statutes involving the incorporation of state law into federal law: (1) the Assimilative Crimes Act ("Crimes Act"), 18 U.S.C. § 13, and (2) 42 U.S.C. § 1988. We look to the Crimes Act because it is an example of Congress applying state law in conjunction with federal law on enclaves. We also consider 42 U.S.C. § 1988, because at the time Congress enacted the civil rights statutes, it recognized that federal civil rights law was not sufficiently comprehensive and would have to rely, in part, on state law to effectuate its objectives. *See Burnett v. Grattan*, 468 U.S. 42, 47 (1984). Similar to § 1333(a)(2)(A) of the OCSLA, 42 U.S.C. § 1988 conditions the incorporation of state law on it being "not inconsistent with the Constitution and laws of the United States."

In *Rodrigue*, the Supreme Court emphasized that drilling platforms on the OCS are "to be treated as island[s] or as federal enclaves within a landlocked State, not as vessels." 395 U.S. at 361. "The central

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[14] *Ecological Rights Foundation* involved inconsistency between federal statutes. 847 F.3d at 1095.

principle of federal enclave doctrine is that Congress has exclusive legislative authority over . . . enclaves. But in the absence of applicable federal legislation displacing state law, those state laws that existed at the time that the enclave was ceded to the federal government remain in force." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1237 (10th Cir. 2012). State law postdating the creation of the enclave, however, is federal law on the enclave only if Congress so directs. *Id.*

The Assimilative Crimes Act is one such directive.[15] "The [Crimes Act] applies state criminal law to a defendant's acts or omissions [in federal enclaves] that are not made punishable by any enactment of Congress." *Lewis v. United States*, 523 U.S. 155, 159 (1998) (emphasis and internal quotation marks omitted). Its "basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." *Id.* at 160. But as we have recognized, the Supreme Court has held that a void or gap—in the sense of a total absence of applicable federal law—is not a prerequisite to the application of state law under the Crimes Act. *See, e.g., United States v. Reed*, 734 F.3d 881, 888 (9th Cir. 2013) (citing *Lewis*, 523 U.S. at 166).

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[15] 18 U.S.C. § 13(a), the Crimes Act, provides: "Whoever within or upon any [federal enclave] . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to a like punishment."

In *Lewis*, the Supreme Court formulated a two-step test for whether state law applies to a defendant accused of committing an offense on an enclave. 523 U.S. at 164-65. The first question is the statutory one: whether the defendant's act or omission has been made punishable by any enactment of Congress. *Id.* at 164. If the act is not punishable by federal law, then the Crimes Act presumptively assimilates state law. *Id.* If Congress has legislated to make the defendant's conduct punishable, then "the court must ask the further question whether the federal statutes that apply to the 'act or omission' *preclude* application of the state law in question," that is, whether "applicable federal law indicate[s] an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue?" *Id.* at 164, 166 (emphasis added). There is no "touchstone to provide an automatic general answer to this second question," and the "primary question . . . is one of legislative intent . . . ." *Id.* at 165-66.

Reed employed *Lewis*'s two-step test to hold that a federal DUI regulation did not bar assimilation of a Nevada drugged driving statute. 734 F.3d at 893. Reed was caught speeding in Lake Mead National Recreation Area. *Id.* at 884. He admitted to smoking marijuana and imbibing alcohol while driving, and failed three of the four field sobriety tests subsequently administered. *Id.* Reed was charged, *inter alia*, under a Nevada statute that penalized the operation of a vehicle while the concentration of marijuana in the operator's blood exceeded a statutorily established limit. Nev. Rev. Stat. § 484C.110(3)(g). Above that limit, a violation of the

statute was established *per se*, i.e., without regard to actual impairment.

Reed moved to dismiss the state charge, arguing that Nevada's *per se* drugged driving law did not apply on the federal enclave where he was stopped because a federal regulation, 36 C.F.R. § 4.23(a)(1), also "prohibit[ed] operating a vehicle while under the influence of alcohol *or* drugs to a degree that renders the operator incapable of safe operation." *Id.* at 886. In other words, Reed argued that because federal law made his conduct punishable, there was no gap in federal law for state law to fill. After a magistrate judge denied Reed's motion to dismiss, Reed pleaded guilty to the state law crime and appealed to our court. *Id.* at 884.

Applying the first step of the *Lewis* test, we agreed with the trial court that the federal enactment punished Reed's conduct. *Id.* at 887. But at step two, we concluded that federal law did not preclude application of the Nevada statute. *Id.* at 888. We noted that there is no "automatic general answer" to *Lewis*'s second question and that the primary inquiry is one of legislative intent. *Id.* Although "a state statute will not be assimilated if, for example, (1) its application would conflict with federal policy; (2) it would effectively rewrite an offense definition that Congress carefully considered; or (3) the federal statutes reveal an intent to occupy so much of a field as to exclude use of the particular state statute," we concluded that "the mere presence of the federal DUI regulation [did] not manifest a federal policy against assimilating Nevada's per se drugged driving law . . . ." *Id.* at 888, 892. *Reed* observed that federal law only included a

per se provision for alcohol; it did not punish those who operated a vehicle under the influence of marijuana absent actual impairment. *Id.* at 886 (citing 36 C.F.R. § 4.23(a)(1)). Further, by providing elsewhere in the federal regulations that "State law that is now or may later be in effect is adopted and made a part of the regulations . . . [,]" 36 C.F.R. § 4.2, the National Park Service clearly expressed its intent for all nonconflicting state traffic laws to apply on federal enclaves. *Id.* at 889. Finding "no indication of an overriding federal policy with which Nevada's per se drugged driving law interferes," we affirmed Reed's convictions. *Id.* at 893.

Although Congress has never provided for the wholesale assimilation of state civil law into federal law on all federal enclaves, it has the authority to do so, and it has done so for the OCS, "an area of exclusive Federal jurisdiction." 43 U.S.C. § 1333(a)(1). In legislating for the OCS, Congress used more precise language than in the Crimes Act, specifying that applicable state law is to apply unless "inconsistent" with federal law. *Reed*, however, remains instructive in two ways. First, it reinforces that where Congress has provided for the assimilation of state law into federal law governing a federal enclave, the "mere presence" of federal law is not enough to prevent application of state law. *Reed*, 734 F.3d at 892. Second, it illustrates the principle that determining whether the presence of federal law precludes the application of state law on an enclave is primarily a question of congressional intent. *Id.* at 888-89 (citing *Lewis*, 523 U.S. at 166); *see also United States v. Souza*, 392 F.3d 1050, 1054 (9th Cir. 2004). In *Reed*, there was not only considerable overlap between the federal and state

DUI laws, but Reed's conduct was actually criminalized by existing federal law. Nevertheless, assimilating Nevada's drugged driving law was entirely consistent with federal law and policy, as the overlapping federal regulation expressly contemplated "assimilation of all nonconflicting state traffic laws." 734 F.3d at 888.

We draw a similar lesson from the jurisprudence pertaining to 42 U.S.C. § 1988(a).[16] Notably, § 1988(a) does use the term "inconsistent." But unlike the OCSLA, it requires, before the assimilation of state law, not simply that the state law be "not inconsistent with the Constitution and laws of the United States," but that "the laws of the United States [be] . . . not adapted to the object, or . . . deficient in the provisions necessary to furnish suitable remedies and punish offenses against [the] law . . . ." 42 U.S.C. § 1988(a). In other words, unlike the OCSLA, § 1988 does require a gap in federal law as a prerequisite for assimilation of state law. Taking that substantial difference into account, judicial interpretation of the term "not inconsistent" in § 1988(a) remains instructive here. In enacting the federal civil rights acts, Congress

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[16] 42 U.S.C. § 1988(a) provides that in the event that the federal civil rights acts "are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." (emphasis added.)

recognized that federal law would not contain every rule that may be required to adjudicate suits brought under them. *Burnett*, 468 U.S. at 47. Accordingly, in § 1988(a), "Congress determined that gaps in [the] federal civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law." *Hardin v. Straub*, 490 U.S. 536, 538 (1989) (footnote omitted). The Supreme Court has explained that "[i]n resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at the policies expressed in them." *Robertson v. Wegmann*, 436 U.S. 584, 590 (1978) (alteration and internal quotation marks omitted).

An example of inconsistency between state and federal law is illustrated by *Burnett*. 468 U.S. at 55. Plaintiffs in *Burnett* were white employees of a predominantly black college who sued their employer for racial and gender discrimination after it refused to renew their contracts. *Id.* at 43-44. The district court borrowed the six-month statute of limitations for filing an employment discrimination complaint with the relevant Maryland administrative body, and dismissed the action. *Id.* at 45. The Fourth Circuit reversed, holding that Maryland's generic three-year statute of limitations applied, *id.* at 45-46, and the Supreme Court affirmed the Fourth Circuit's decision. *Id.* at 46. The Supreme Court observed that "[a] legislative definition of a statute of limitations also reflects a policy assessment of the state causes of action to which it applies." *Id.* at 52. Hence, insofar as state policies are "inconsistent with, or of marginal relevance to, the policies informing the Civil Rights

Acts," their accompanying statutes of limitations may be unsuitable for use under § 1988(a). *Id.* at 53. Contrasting the broad remedial goals of the federal civil rights statutes—"compensation of persons whose civil rights have been violated, and prevention of the abuse of state power"—to the relatively modest ambitions of Maryland's administrative scheme for employment discrimination, the *Burnett* court found Maryland's policy to be "manifestly inconsistent with the central objective of the Reconstruction- Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Id.* at 53-55.

While § 1988(a) is not textually parallel to § 1333(a)(2)(A) of the OCSLA, we glean from *Burnett* and similar cases, *see, e.g.*, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the principle that inconsistency between state and federal law is assessed by looking at Congress's objective in enacting the federal statutes at issue.

c. Whether California Minimum Wage and Overtime Laws are Inconsistent with Federal Law

We thus turn to the remaining question and the crux of Newton's appeal: whether California's minimum wage and overtime laws are inconsistent with the FLSA.

The FLSA was enacted to "protect all covered workers from substandard wages and oppressive working hours." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2121 (2016) (internal quotation marks omitted). It "seeks to prohibit 'labor conditions

detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (quoting 29 U.S.C. § 202(a)). Critical to our analysis, the FLSA "establish[es] a national *floor* under which wage protections cannot drop." *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990); *see Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 759 (9th Cir. 2010) ("[T]he FLSA sets a floor rather than a ceiling on protective legislation."), *vacated on other grounds, Chinese Daily News, Inc. v. Wang*, 565 U.S. 801 (2011). The FLSA's savings clause expressly provides that states are free to adopt more protective standards for minimum wages or maximum hours in a work week:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter.

29 U.S.C. § 218(a). Since "the best evidence of Congress's intent is the statutory text," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012), and the FLSA explicitly permits more protective state wage and hour laws, we reject Parker's suggestion that California's minimum wage and overtime laws are antagonistic to the remedial purposes of the FLSA simply because they establish different and more

generous benchmarks than the floor set by the FLSA's statutory and regulatory scheme.[17]

Moreover, the application of California minimum wage and overtime laws as federal law on the OCS serves the purpose of the OCSLA. In *Huson*, the Supreme Court observed that "Congress . . . recognized that the special relationship between the men working on these artificial islands and the adjacent shore to which they commute favored application of state law with which these men and their attorneys would be familiar." 404 U.S. at 103 (internal quotation marks omitted). Application of California's minimum wage and "hours worked" provisions does not vitiate the "special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families," *Rodrigue*, 395 U.S. at 365; if anything, this policy consideration indicates that the overlapping state and federal statutory schemes regulating employment on the California shore should also

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[17] Newton asserts that "inconsistency with regulations promulgated by departments other than the Department of the Interior does not bar the application of the state law" on the OCS. As a general matter, "properly promulgated, substantive agency regulations have 'the force and effect of law'" such as "to pre-empt state law under the Supremacy Clause." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979); *see Wyeth v. Levine*, 555 U.S. 555, 576 (2009). We have "turned to these longstanding DOL regulations in resolving FLSA . . . disputes." *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 940 (2004). The OCSLA does not preclude courts from looking beyond the bare text of the FLSA to DOL regulations for illumination as to the content of existing federal law.

govern, as federal law, on the OCS.[18] Application of California's wage and hour laws also does not frustrate an interest in national uniformity, because in enacting OCSLA, Congress "specifically rejected national uniformity as a paramount goal." *Gulf Offshore*, 453 U.S. at 487 (quoting *Huson*, 404 U.S. at 104) (internal quotation marks omitted).

Parker cites numerous cases for its contention that the FLSA is inconsistent with California's minimum wage and overtime laws. In particular, Parker relies on *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015). *Mendiola* involved California wage and hour claims brought by security guards who regularly patrolled construction sites for eight hours on weekdays and sixteen hours on weekends, and who were required to reside, uncompensated, in an employer-provided trailer for eight hours after each shift and remain on-call. 60 Cal. 4th at 837. The *Mendiola* court held that these on-call hours were "hours worked" for the purposes of California's Wage Order 4, and that the employer "could not exclude 'sleep time'" from the compensable hours in the security guards' 24-hour shifts. *Id.* at 838. In reaching this result, the California Supreme Court rejected the employer's argument that federal DOL regulations furnished the appropriate definition for hours worked under California's wage order. *Id.* at

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[18] To be clear, this "special relationship with the shore community," alone, does not support claims brought pursuant to § 1333(a)(2)(A) of the OCSLA "regardless of the location of the accident." *See Tallentire*, 477 U.S. at 218-19. This policy consideration only applies for grievances that arise on the OCS. *Id.*

842-44. Emphasizing that it had previously "cautioned against confounding federal and state labor law," the California Supreme Court ruled that the language of Wage Order 4 did not evidence the state Industrial Welfare Commission's intent to incorporate, by reference, federal law and regulations. *Id.* at 843, 847 (internal quotation marks omitted). Parker argues that *Mendiola* illustrates that California law is inconsistent with the FLSA. *See Brigham*, 357 F.3d at 940-41. We disagree. *Mendiola* only establishes that California embraces a more protective standard for determining hours worked, not that California's standard is *inconsistent* with federal law. Indeed, the savings clause in the FLSA reflects Congress's express intent that states should be allowed to adopt more protective standards. *See* 29 U.S.C. § 218(a). Parker has failed to demonstrate that California's minimum wage and overtime laws are inconsistent with federal law, and we know of nothing else indicating that California's provisions for minimum wage and maximum hours worked are inconsistent with the FLSA.

We conclude the district court erred by dismissing the claims Newton brought pursuant to California's minimum wage and overtime laws, and that California's minimum wage and maximum hours worked provisions are "applicable and not inconsistent," 43 U.S.C. § 1333(a)(2)(A), with the FLSA. We vacate the order dismissing these claims and remand to the district court.

2. Newton's Claims under California Meal Period, Final Pay, and Pay Stub Laws

The district court dismissed the claims Newton brought pursuant to California's meal period, final pay, and pay stub laws because it concluded that state law does not apply on the OCS unless there is a "significant void or gap" in federal law, and it found that there were no such voids or gaps. In reaching this ruling, the district court relied on its conclusion that the FLSA is a comprehensive scheme, rather than considering whether California's wage and hour laws are inconsistent with the FLSA. Because we hold that the absence of federal law is not a prerequisite for applicable and not inconsistent state law to become surrogate federal law on the OCS, we vacate the order dismissing these claims. The district court shall determine on remand whether California's meal period, final pay, and pay stub laws are "not inconsistent" with existing federal law. If they are, the OCSLA adopts them as federal law on the OCS.

3. Newton's Civil Penalties and Unfair Competition Claims

Newton's claims under California's Private Attorney General Act (PAGA) and Unfair Competition Law (UCL) were dismissed by the district court on the grounds that he had not demonstrated a violation of California's labor and employment laws. Because we vacate the dismissal of Newton's other claims under California law, we also vacate the dismissal of his PAGA and UCL claims.

4. Leave to Amend

Newton's operative complaint suggests that some of Parker's allegedly unlawful conduct occurred in California. We cannot determine on the record before us whether Newton has any claim arising from the time he spent onshore or within California's territorial waters. This portion of the complaint is cryptic and it has not been addressed by the district court. Under our precedent, Newton is entitled to an opportunity to clarify these claims. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (observing that the rule that leave to amend shall be "freely given" is "to be applied with extreme liberality") (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)).

IV. Conclusion

We vacate the order dismissing Newton's claims and remand to the district court for further proceedings consistent with this opinion.

VACATED and REMANDED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56352

BRIAN NEWTON, an individual,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD., Erroneously Sued As Parker Drilling Management Services, Inc.,

Defendant-Appellee,

and

PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation,

Defendant.

Filed: Apr. 27, 2018

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges

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ORDER

The Washington Legal Foundation's motion for leave to file brief as amicus curiae in support of Appellee's petition for rehearing en banc is GRANTED.

The panel votes to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The opinion, filed on February 5, 2018, is amended. On page 40, after the sentence, "We vacate the order dismissing Newton's claims and remand to the district court for further proceedings consistent with this opinion[,]" the following footnote is added: "We reserve for the district court's consideration on remand the question whether our holding should be applied retrospectively. *See Huson*, 404 U.S. at 355."

With the foregoing amendment, the petition for rehearing en banc, filed March 22, 2018, is DENIED. No further petitions for rehearing will be entertained.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56352

BRIAN NEWTON, an individual,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD., Erroneously Sued As Parker Drilling Management Services, Inc.,

Defendant-Appellee,

and

PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation,

Defendant.

Filed: May 16, 2018

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges

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ORDER

Defendant-Appellee's motion to stay the issuance of the mandate is GRANTED. Issuance of the mandate is stayed pending the filing of a petition for a writ of certiorari in the United States Supreme Court. If such

a petition is timely filed, the stay shall remain in effect until the petition is denied or, if granted, pending determination of the cause by the United States Supreme Court.

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 15-cv-02517-RGK-AGR

BRIAN NEWTON, an individual,

Plaintiff,

v.

PARKER DRILLING MANAGEMENT SERVICES, INC.; PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Defendants,

Filed: August 10, 2015

Before: Honorable R. Gary Klausner

(IN CHAMBER) ORDER RE: DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT (DE 8)

I. Introduction

On February 17, 2015, Brian Newton ("Plaintiff") filed a putative class action against Parker Drilling Management Services, Ltd.[1] ("Defendant") in the Santa Barbara County Superior Court. On March 23,

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[1] Defendant was erroneously sued as Parker Drilling Management Services, Inc.

2015, Plaintiff and the putative class filed a First Amended Complaint ("FAC") in state court asserting the following claims: (1) minimum wage violations; (2) pay stub violations; (3) unfair competition; (4) failure to timely pay final wages; (5) failure to provide lawful meal periods; (6) failure to pay overtime and double-time premium wages; and (7) civil penalties under the Private Attorneys General Act of 2004 (the "PAGA"). On April 6, 2015, Defendant removed the action to this Court on the basis of federal question jurisdiction pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331, *et seq.*

Presently before the Court is Defendant's Motion for Judgment on the Pleadings, or alternatively, for Summary Judgment. For the following reasons, the Court GRANTS the Motion.

II. Factual Background

Plaintiff alleges the following in his Complaint.

Defendant employed Plaintiff and the putative class, comprising over twenty-five persons, as hourly employees who worked on oil platforms in the off-shore waters in the Santa Barbara Channel. Defendant specifically employed Plaintiff from approximately January 25, 2013 to January 15, 2015. Plaintiff's shift typically lasted fourteen days during which time he could not reasonably leave the platform. However, Defendant only paid Plaintiff for twelve hours each day, which omitted the remaining twelve hours of the day that Plaintiff was present on the platform.

Plaintiff and the putative class allege the following claims under California law: (1) Defendant failed to pay the state-mandated minimum, overtime,

double-time, and meal period premium wages for all hours worked, which constitutes an unfair business practice; (2) Defendant failed to provide adequate pay stubs because they do not contain all hours and wages earned or the correct name of Plaintiff's employer; and (3) upon termination, Defendant did not timely pay all wages earned or unpaid to Plaintiff and the putative class. Among other relief, Plaintiff and the putative class seek minimum, overtime, double-time, and meal period premium wages owed with prejudgment interest pursuant to Labor Code Sections 3288 and 3289, waiting-time penalties pursuant to Labor Code Section 203, and civil penalties pursuant to Labor Code Sections 2698, *et seq.*

III. Judicial Standard

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure ("Rule") 12(c) is "functionally identical" to a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). The only significant difference is that a Rule 12(c) motion is properly brought "after the pleadings are closed—but early enough not to delay trial," whereas a 12(b)(6) motion must be filed before the answer. Fed. R. Civ. P. 12(b)-(c). In ruling on a Rule 12(c) motion, as with one under Rule 12(b)(6), a court must assume the allegations in the challenged complaint are true, and must construe the complaint in the light most favorable to the non-moving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Dismissal is appropriate "only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory."

Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008.)

When considering a Rule 12(c) motion for judgment on the pleadings, a court may consider facts that are subject to judicial notice. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999). If resolution of a Rule 12(c) motion requires consideration of facts extrinsic to the pleadings that are not judicially noticeable, a court must treat the motion as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d); *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1207 (9th Cir. 2007).

To prevail on a summary judgment motion, the moving party must show that there is no genuine issue of material fact as to matters upon which it has the burden of proof at trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See id.* at 326. Upon such showing, a court may grant summary judgment on all or part of the claim. Fed. R. Civ. P. 56(a).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of

material fact for trial. *See Celotex Corp.*, 477 U.S. at 324.

IV. Discussion

A. Defendant's Motion for Judgment on the Pleadings

Defendant argues that judgment on the pleadings in its favor is warranted for the following reasons: (1) the pleadings are closed; and (2) Plaintiff's claims are subject to OCSLA, which is exclusively governed by federal law unless "applicable and not inconsistent" state law is necessary to fill a "significant void or gap" in federal law. The Court agrees.

1. The Pleadings are Closed

Defendant argues that the pleadings are closed because Defendant has filed an Answer to the FAC and Plaintiff has exhausted his right to amend the Complaint once as a matter of course. The Court agrees.

The pleadings are closed for the purposes of a Rule 12(c) motion once a complaint and answer have been filed, assuming, as is the case here, that no counterclaim or cross-claim is made. *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005). Here, Plaintiff's FAC and Defendant's Answer have been filed. As such, the Court finds that the pleadings are closed for purposes of the present Motion and that the timing of Defendant's Motion is proper.

2. Plaintiff's Claims are Subject to OCSLA

The parties agree that all of Plaintiff's claims arise out of oil platforms subject to OCSLA. The purpose of OCSLA is to define a body of law applicable

to the seabed and subsoil of the "[O]uter Continental Shelf" and to the fixed structures erected thereon. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969). The "[O]uter Continental Shelf" generally includes all submerged lands within the territorial waters of the United States lying more than three miles from the coast of a state. *Valladolid v. Pac. Operations Offshore*, 604 F.3d 1126, 1130 (9th Cir. 2010).

Pursuant to OCSLA Section 1333(a)(1), the law to be applied to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and installations connected to the seabed of the Outer Continental Shelf is exclusively federal. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 (1981); *see* 43 U.S.C. § 1333(a)(1); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 100 (1971). However, the law of an adjacent state may be adopted as the law of the United States to the extent that the state law is "applicable and not inconsistent" with the FLSA, regulations of the Secretary, or other federal laws. 43 U.S.C. § 1333(a)(2)(A); *see Union Oil Co. v. Oppen*, 501 F.2d 558, 560-61 (9th Cir. 1974). Such state law is only "applicable" to the extent that federal law, because of its limited function in a federal system and inadequacy to cope with the full range of potential legal problems, has a significant void or gap. *See Rodrigue*, 395 U.S. at 357; 43 U.S.C. § 1333(a)(2)(A). Therefore, under OCSLA, federal law governs and state law only applies to the extent it is necessary "to fill a significant void or gap" in federal law. *See Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969) ("[T]he deliberate choice of federal law . . . requires that 'applicable' be

read in terms of necessity—necessity to fill a significant void or gap."); *Nations v. Morris*, 483 F.2d 577, 585 (5th Cir. 1973) ("*Rodrigue* means that there must exist a gap before state law can be applicable").

Here, there are no "significant voids or gaps" in the applicability of the governing federal law, the Fair Labor Standards Act of 1938 (the "FLSA"), to the actions of which Plaintiff complains. Thus, it is not necessary to apply the law of the "adjacent state," which is California. Based on this finding, Plaintiff's contention that the FLSA's Savings Clause permits state law to concurrently govern with federal law is inapposite because it disregards OCSLA's necessity standard. The Court will first address Plaintiff's Savings Clause argument and then will address each claim in turn.

a. The FLSA's Savings Clause

Plaintiff contends that the FLSA includes a Savings Clause that allows federal and state law to concurrently regulate wage-and-hour claims in order to provide greater protection for employees. The FLSA's Savings Clause provides in relevant part: "No provision of [the FLSA] excuse[s] noncompliance with any Federal or State law . . . establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum workweek lower than the maximum workweek established under [the FLSA]." 29 U.S.C. § 218(a). The Ninth Circuit has interpreted this clause as evidence that Congress did not intend the FLSA to preempt state wage-and-hour law. *See, e.g.*, *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000); *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990).

While Plaintiff's contention may be true in the absence of another controlling statute governing the relationship between federal and state law, here there is such a statute—OCSLA, which requires that federal law exclusively governs unless the adoption of state law is necessary to fill a "significant void or gap" in federal law. OCSLA provides the governing standard here.

For his interpretation of the Savings Clause, Plaintiff relies on *Pacific Merchant Shipping Ass'n v. Aubry*, which held that the FLSA does not preempt California's overtime laws as applied to vessels in the Santa Barbara Channel. 918 F.2d at 1415. However, *Aubry* involved vessels that are not subject to OCSLA, and thus the court in *Aubry* did not interpret the FLSA under the OCSLA necessity standard. *See Aubry*, 918 F.2d at 1415. Therefore, *Aubry* does not control the Court's analysis here. *See Mersnick v. USProtect Corp.*, No. C-06-03993 RMW, 2006 WL 3734396, at *7 (N.D. Cal. Dec. 18, 2006) (holding that under OCSLA, "the standard for whether state law applies is necessarily more stringent [than general preemption principles] given the exclusivity of federal jurisdiction").

Furthermore, *Le Sassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), is instructive on this point. Although *Le Sassier* did not involve the FLSA, it did involve the application of federal and state law claims under OCSLA and addressed the contention that federal law does not preempt state law. *See id.* at 509. The court in *Le Sassier* held that a state law claim could not be pursued because federal law had its own comprehensive provisions relating to the claim. *Id.* at

509 (holding that there was no "gap" in federal law, and thus no authority permitting state law, where Congress provided a specific statutory provision addressing the claim). Additionally, the court found that the Supreme Court decision in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 724-25 (1980), holding that federal law does not preempt state law providing more generous benefits, was inapposite under OCLSA. *See Le Sassier*, 776 F.2d at 509. *Le Sassier* therefore demonstrates that ordinary preemption principles and the FLSA's Savings Clause do not govern disputes arising under OCSLA. Thus, Plaintiff's contention that the Savings Clause allows California law to govern concurrently with the FLSA fails.

b. Necessity of State Law as to Each of Plaintiff's Claims

Defendant argues that the FLSA is a comprehensive federal statute as to all of Plaintiff's claims, and thus California law is inapplicable. The Court agrees.

(1) Minimum Wage, Overtime, and Double-time Violations

Plaintiff's first and sixth claims are for minimum wage violations and failure to pay overtime and double-time premium wages under California Labor Code Sections 510, 1194, and 1197. (FAC ¶¶ 14, 59.) Sections 1194 and 1197 direct employers to compensate employees at the state-mandated minimum wage for all hours worked. Cal. Lab. Code § § 1194, 1197. Section 510 provides that eight hours of labor constitutes a day's work and provides compensation rates for work in excess of eight- and twelve-hour workdays. Cal. Lab. Code § 510(a).

However, the "FLSA provides a comprehensive scheme providing for minimum wages and overtime pay." Ann K. Wooster, J.D., *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. Fed. 507, § 2[a] (2004); *see Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013) ("The FLSA establishes federal minimum-wage, maximum hour, and overtime guarantees."); 29 U.S.C. § § 206-207. Additionally, the FLSA defines "hours worked" with regard to employees who are required to be on duty for twenty-four hours or more. 29 C.F.R. § 785.22. Thus, there is no "significant void or gap" in the FLSA's coverage of Plaintiff's first and sixth claims, and therefore California wage-and-hour law is inapplicable.

(2) Failure to Provide Lawful Meal Periods

Plaintiff's fifth claim for failure to provide lawful meal periods arises under California Labor Code Sections 226.7 and 512. (FAC ¶ 49.) Section 512 provides that no employer shall employ any person for a work period of more than five hours without a meal period of not less than thirty minutes. Cal. Lab. Code § 512(a). Section 226.7 sets forth "the only compensation" for a violation of Section 512, *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1104 (2007), and provides that "the employer shall pay the employee one additional hour of pay . . . for each work day that the meal or rest or recovery period is not provided." Cal. Lab. Code § 226.7(b).

While the FLSA does not mandate certain rest and meal periods, it does provide for when those periods must be compensated. *Cal. Dairies, Inc. v.*

RSUI Indem. Co., 617 F. Supp. 2d 1023, 1034 (E.D. Cal. 2009). Specifically, federal regulations implementing the FLSA require that an employer compensate an employee at his regular wage for any such meal periods that are not "bona fide" as defined by 29 C.F.R. § 785.19. *Cal. Dairies, Inc.*, 617 F. Supp. 2d at 1043-44; *see* 29 C.F.R. § 785.19 (defining bona fide meal periods as non-worktime periods during which an employee "must be completely relieved from duty for the purposes of eating regular meals"). Additionally, the FLSA requires that overtime wages be paid for all "hours worked," including non-bona fide meal periods, in excess of forty hours per week. 29 U.S.C. § 207(a)(1). Moreover, the purpose behind both the California Labor Code and FLSA compensation provisions are identical, i.e., to ensure that employers provide their employees with meal and rest breaks. *See Cal. Dairies, Inc.*, 617 F. Supp. 2d at 1043.

For these reasons, the FLSA provides sufficient coverage of meal period requirements and there exists no "significant void or gap." *See id.* at 1044 (noting that even though the California Labor Code "meal and rest benefits are not identical to the FLSA, both provide some form of meal and rest benefits to be paid by, and which are entirely within the control of, the employer even if the amounts are calculated differently"). Thus, California law regarding meal periods is inapplicable.

(3) Unfair Competition

Plaintiff's third claim for Unfair Competition in violation of California Business and Professions Code Sections 17200, *et seq.* (the "UCL") is based upon Defendant's failure to pay the state-mandated

minimum, overtime, double-time, and meal period premium wages. (FAC ¶¶ 32-33.) The UCL prohibits acts of unfair competition, which include any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. As discussed above, California law regarding wages, hours, and meal periods is inapplicable. It follows then that Plaintiff's UCL claim, predicated on the violations of that same law, also fails. *See Mersnick*, 2006 WL 3734396, at *10. Additionally, Section 216 of the FLSA provides penalties for an employer's violation of the minimum wage, maximum hours, overtime, and meal-time provisions. 29 U.S.C. § 216. For this additional reason, California law is not necessary to fill a "significant void or gap" in the FLSA. Thus, California unfair competition law is inapplicable.

(4) Pay Stub Violations

Plaintiff's second claim for pay stub violations is premised on Defendant's failure to comply with Labor Code Section 226. (FAC ¶ 29.) Section 226(a) requires certain information—such as gross wages earned, total hours worked, net wages earned, and the employer's name and address—to be included on an employee's pay stubs. Cal. Lab. Code § 226(a). While the FLSA does not require employers to provide employees with pay stubs, it does require employers to keep accurate records of hours worked and wages paid to employees, among other information. *See* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2; *Cal. Dairies*, Inc., 617 F. Supp. 2d at 1046. Because the FLSA prescribes recordkeeping practices which must be maintained and penalties for failure to follow its requirements, the FLSA sufficiently covers Plaintiff's second claim,

leaving no "significant void or gap." As such, California law regarding pay stub violations is inapplicable.

(5) Failure to Pay Timely Wages

Plaintiff's fourth claim for failure to timely pay final wages arises under Labor Code Sections 201 and 202. (FAC ¶ 40.) Section 201 provides that a terminated employee's wages earned and unpaid at the time of discharge are due and payable immediately upon termination. Section 202 requires that an employee's wages are due and payable within seventy-two hours after quitting his employment.

In comparison, the FLSA "'delineates administrative procedures by which covered worktime must be compensated' under federal law." *Mersnick*, 2006 WL 3734396, at *8 (quoting 5 C.F.R. § 551.101(a)). Specifically, the FLSA provides that an employer who fails to pay minimum wages and/or overtime wages is subject to a penalty equal to the amount of unpaid compensation. 29 U.S.C. § 216(b). Under the FLSA, wages are considered "unpaid unless they are paid on the employees' regular payday." *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994). The court in *Davis v. Maxima Integrated Products* extended the payment requirement in *Biggs* to terminated employees. *See* 57 F. Supp. 2d 1056, 1058 (D. Or. 1999) (holding that an employer's issuance of a terminated employee's final paycheck on the regularly scheduled payday, which happened to be several days after the employee left the job, comported with the FLSA).

Thus, the FLSA sufficiently addresses payment upon termination and there is no "significant void or

gap." As such, California law regarding payment upon termination is inapplicable.

(6) Civil Penalties

Plaintiff's seventh claim for civil penalties arises under the Private Attorneys General Act of 2004 ("PAGA"), which allows aggrieved employees to recover state civil penalties for violations of the California Labor Code. Cal. Lab. Code § 2699(a). However, because, as discussed above, California law is inapplicable to Plaintiff's claims, there are no civil penalties for Plaintiff to collect under PAGA. Therefore, Plaintiff fails to state a claim upon which relief can be granted.

For the above reasons, California state law pertaining to Plaintiff's claims is not adopted as surrogate federal law under OCSLA. As such, Plaintiff's claims are exclusively governed by the FLSA. Because Plaintiff brought his claims under state law, the FAC "lacks a cognizable legal theory" and fails to state claims upon which relief can be granted. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Therefore, the Court GRANTS Defendant's Motion for Judgment on the Pleadings.

B. Defendant's Motion for Summary Judgment

Since the Court grants Defendant's Motion for Judgment on the Pleadings, it is not necessary to address the merits of Defendant's alternative Motion for Summary Judgment.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Judgment on the Pleadings.

IT IS SO ORDERED.

Appendix E

Relevant Statutory Provisions

43 U.S.C. § 1332(1)

It is hereby declared to be the policy of the United States that—

> (1) The subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;
>
> * * *

43 U.S.C. § 1333(a)(1)-(2)(A)

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or

issued only under the provisions of this subchapter.

(2) (A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.